



# **‘Negotiating’ development: enhancing the legitimacy of developer obligations for off- site costs in private law agreements**

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## Colofon

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## **Abstract**

The legitimacy and accountability of developer obligations [DOs] for off-site costs have been criticized in the Netherlands. Several Dutch municipalities ask these DOs for a wide variety of purposes, calculated through different calculation methods. There often seems to be a lack of clarity about the link between the contributing developments and the DOs for off-site costs and sometimes these DOs are even paid for provisions that will not be realized at all. Additionally, the recovery of these obligations via private law agreements involves uncertainties about the enforceability and in particular about the scope of costs that can be recovered. Through five case studies, this qualitative research investigates how the legitimacy of DOs for off-site costs can be enhanced in private law agreements. It is concluded that the legitimacy of DOs for off-site costs can be enhanced by input, throughput and output aspects of legitimacy and that the political, legal, social and ethical dimension of legitimacy must be viewed in conjunction to get to integrated ways of enhancing the legitimacy of DOs. The study provides a framework to have a dialogue on the different dimensions of legitimacy and the multiple interests affected, despite the intricate connections and inherent contradictions that can occur between and within the various dimensions of legitimacy.

## Preface

This report is the final product of six months research on DOs for off-site costs in private law agreements, viewed from the Dutch planning context and the perspective of legitimacy. The report is written to complete the master's degree Spatial Planning at the Radboud University, where I followed the specialization Planning, Land and Real Estate Development. The starting point of this research is to gain more insight into, and explain, legitimacy issues that (can) arise within the Dutch planning practice of charging DOs for off-site costs. In addition, the purpose of the research is to provide more insight into ways to enhance the legitimacy of DOs for off-site costs within private law agreements. A challenging topic I noticed in the past six months, partly because of the multidimensional and contested character of the concept of legitimacy and because of the transition of the current Dutch Spatial Planning Act (Wro) to the new Environment and Planning Act [EPA]. As a result, the research took place simultaneously with some worth mentioning changes regarding DOs for off-site costs under the new law. Nevertheless, these changes emphasize the actuality of the subject.

Writing this thesis would never have been possible without the help of others. There are many people to whom I owe my gratitude for their support, guidance and patience. First of all, I want to thank the informants in the research who were willing to free up time and share their knowledge. Their contribution to this research and the insight that they have offered me have contributed to the realization of the end product. I also want to express my appreciation to my thesis supervisor prof. dr. Erwin van der Krabben, whose constructive comments were essential for ensuring the quality of this study. I would also like to use this preface to thank my internship supervisor, Sander Korthouwer, for thinking along and being involved in the research. Just as my colleagues for what you taught me and for offering the opportunity to combine my graduation research with an internship. Last but not least, my sincere thanks go out to family and friends for their support and encouragements throughout these past months.

Cynthia Oorschot,

March, 2020

## Summary

The legitimacy and accountability of DOs for off-site costs, particularly at the local level, have been severely criticized in the Netherlands. There often seems to be a lack of clarity about the link between the contributing developments and the DOs for off-site costs and sometimes DOs are even paid for provisions that will not be realized at all. Additionally, the recovery of these obligations via private law agreements involves uncertainties about the enforceability and in particular about the scope of costs that can be recovered. Within these unclear legal limits, developers are faced with a proliferation of different types of approaches and amounts of DOs in different municipalities, as a consequence of the decentralized approach towards DOs for off-site costs in which every municipality has its own policy regarding the subject. Together with a broadened scope of contributions to spatial developments, by making them enforceable under public law in the new Environment and Planning Act (EPA), the legitimate boundaries of DOs for off-site costs have engendered much debate in the Netherlands.

Through five municipal case studies this thesis examines how the legitimacy of DOs for off-site costs in private law agreements comes about and how it can be enhanced in Dutch municipalities. Empirical research is conducted on the basis of interviews with both planning practitioners involved in drawing up policies or negotiating DOs for off-site costs and developers. Legitimacy, which can be defined as *'the justified, legally, politically recognized and socially acceptable right to exercise authority'* (Bokhorst, 2014, p. 20), is divided into four separate dimensions in this study: a legal, political, social and ethical dimension. In the research these dimensions are also analyzed on the basis of the well-known input, throughput and output legitimacy aspects of Scharpf (1999) and Schmidt (2013). Based on this, more insight has been gained into the legitimacy problems that can arise before, during and after the negotiations for concluding a private law agreement, how DOs for off-site costs can be deployed in a legitimate way and how the legitimacy of these DOs for off-site costs can be enhanced.

It appears that in the Dutch context the emphasis for legitimizing DOs for off-site costs seems to be on political legitimacy. In the case studies, the town council is usually responsible for establishing policy on DOs for off-site costs, deciding about policy updates and in some of the case studies the town council even decides about any deviation from the policy. Although this leads to a high degree of input legitimacy through criteria such as 'democracy', input legitimacy based on criteria as 'involvement of actors in the decision-making process' and 'participative quality' seems to be limited. Additionally, the research shows that political legitimacy does not always have to lead to effective or rational decisions, as Kant (1999) also stated. Entities still hold their political legitimacy on the basis of electoral democracy, even when the process (throughput) or the outcome (output) ceases to be accepted. While only the formal dimensions of political and legal legitimacy are necessary in a democratic constitutional state according Bokhorst (2014), the research shows that without widely shared views on justice and social acceptance, the formal acceptability of laws and policy can erode over time and the relationship of trust between municipalities and developers can be deteriorated.

In contrast to political legitimacy, the social and ethical dimension of the legitimacy of DOs for off-site costs focus more on throughput and output aspects. The research has shown that developers seem to accept the principle that municipalities request DOs for off-site costs, as long as it stems from the principle that the city is growing and additional investments are needed that are partly the result of their development. Nevertheless, multiple developers indicated that in practice several problems arise in the field of municipal elaboration, transparency and accountability regarding DOs for off-site costs. They describe that it is almost never clear what is being paid for, that a cause-and-effect relationship between their development and the requested DOs is often missing and that planning departments often seems to lack the knowledge to justify the DOs for off-site costs and the choices made. In addition, many developers indicate that negotiation of the amounts of obligations is often not possible, even in case of 'contributions to spatial developments', which are not even enforceable via public law under current Dutch legislation (Wro). This seems to contradict the voluntary idea that follows from Article 6.24 paragraph 1 Wro.

Some developers thus see DOs for off-site costs as a 'black box' or 'grey area' with little insight for those to whom the policy applies. Based on the interviews with planning practitioners, four possible explanations who can partly explain developers' criticism have been found in the study. First of all, many municipalities seem to have policy for off-site costs at city level, whereby they often distribute the costs evenly across all

developments in the municipality. As a result, the policy appears to function mainly as a redistribution policy, whereby the link between paying projects and the DOs for off-site costs is difficult to substantiate (1). Secondly, given that many municipal respondents indicated that the policy is a council framework they cannot simply deviate from, this seems to be at odds with the negotiable nature of DOs in private law agreements. Because the town council also decides on the spending of the DOs, civil servants often cannot make any commitments to developers (2). Additionally, the interviews with some planning practitioners show that not all civil servants who are involved in concluding private law agreements in the municipality seem to be equally well informed about the DOs for off-site costs. For example, about the expenses, uncertainties and how the amount of the DOs came about. This seems to encourage intransparency (3). And lastly, the policy of many municipalities in which the expenditure is stated (vision documents), often seems to be outdated (4).

As a result of these findings, multiple ways have been discussed in the research to enhance the legitimacy of DOs for off-site costs from the perspective of developers, which can also be referred to as the social dimension of legitimacy. Considering that many developers interviewed indicate that, partly to prevent delays, the amount of the DOs in relation with previous experiences determines their acceptance in the first place, comparative research into the usual amounts that other municipalities demand can be done to enhance the social dimension of legitimacy. However, the research showed that especially for local developers or when the DOs for off-site costs undermine the viability of a development, more than just the amount of the DOs is important to consider the DOs for off-site costs as legitimate. As a result, the social dimension of legitimacy can also be enhanced through more transparency, a clearly explained link between the development and the DOs for off-site costs, current and findable policy documents, more accountability of municipalities during the negotiations, sufficient knowledge of municipal employees involved and openness about any uncertainties in the implementation phase. Splitting the contribution per area in the city, subtracting the square meters of demolition from the square meters on which the amount of DOs is calculated or only charging the full amount of costs for provisions that are a hundred percent certain seem to contribute to the legitimacy of DOs for off-site costs as well. The research shows that a higher level of openness to interest mediation during the negotiations seems to be important for enhancing the ethical dimension of legitimacy. In addition to increasing the legitimacy of the process (throughput) and the outcome (output) via these ways, more participation of developers beforehand can increase the input legitimacy as well.

Based on these findings, this research adds '*implementation legitimacy*' to the distinction of input, throughput and output legitimacy as described by Schmidt (2013). The research namely shows that the output of the negotiations does not always have to be in line with the actual implementation of these provisions, since planning practitioners can make little or no commitments about the expenses. In contrast to input, throughput and output legitimacy, implementation legitimacy focuses on the compliance of agreements made and the documentation and accountability of certain actions after agreement has been reached. Especially local developers indicated that they consider DOs for off-site costs as more legitimate when they see that the municipality realizes certain provisions as stated in their policy or as explained during the negotiations.

The thesis also shows several ways in which the legal dimension of legitimacy regarding DOs for off-site costs can be enhanced. The main problem under the current Dutch legislation seems to be a lack of clarity, because of the absence of definitions of the types of DOs. This leads to a proliferation of interpretations of the law at the local level. The legitimacy of the legislation itself can therefore be increased by including clear definitions of the scope and types of DOs for off-site costs, together with a less rapid alternations of new laws. Increasing the legitimacy of laws themselves seems to contribute to more certainty about the legality of DOs for off-site costs, as a result of which the degree that government action is in line with legislation is likely to be increased.

Despite all these normative criteria that seem to enhance the legitimacy of DOs for off-site costs in private law agreements, this research shows that legitimacy can be experienced differently by different actors or in different contexts, as also pointed out by Oosterhout (2001). In spite of this context dependency, the concept of legitimacy offers a nuanced way to discuss dilemmas of appropriateness of government action that evidently arise regarding DOs for off-site costs in the Netherlands under the current legislation and soon the EPA. The concept provides a framework to have a dialogue on the different dimensions of legitimacy

and the multiple interests affected, despite the intricate connections and inherent contradictions that can occur between and within the various dimensions of legitimacy. Because the research showed that the legitimacy of DOs for off-site costs can be enhanced by both input, throughput and output aspects, it is needed to look further than just political legitimacy. An over-emphasis on political legitimacy namely seems to foster legitimacy dilemmas and seems to lose sight of throughput and output aspects of legitimacy. The four separate dimensions of legitimacy must thus be viewed in conjunction to get to integrated ways of enhancing the legitimacy of DOs. Finding the solution in the further standardization of DOs for off-site costs, such as the Community Infrastructure Levy [CIL] in Britain, thereby does not seem desirable in the Netherlands. However, a debate about whether or not to apply the PPT-criteria under private law seems inevitable in the context of enhancing the legitimacy of DOs for off-site costs.

## List of terminology and abbreviations

Dutch term	English term	Abbreviation (if applied)	Brief explanation	Page first mentioned
Planningsverplichtingen	Developer obligations	DOs	Contributions from project developers and landowners when public land use decisions increase the economic value of their land.	3
Onderhandelbare planningsverplichtingen	Negotiable developer obligations	NDOs	Contributions from project developers and landowners when public land use decisions increase the economic value of their land. These contributions can be negotiated between municipalities and developers/landowners.	15
Omgevingswet	Environment and Planning Act	EPA	The new Dutch planning Act, which is expected to enter into force in 2021	4
Wet ruimtelijke ordening	(Current) Dutch Spatial Planning Act	Wro	Current Spatial Planning Act in the Netherlands, which is in force since 2008	4
Besluit Ruimtelijke Ordening	-	Bro	A further elaboration of the Dutch Spatial Planning Act (Wro)	13
Kosten met een gebiedsoverstijgend karakter	Off-site costs		Costs for the realization of provisions that benefit several areas or provisions that are fully attributable to a certain development, but are realized outside the plan area.	3
Anterieure overeenkomst	Private law agreement		A private law agreement between a government body and a market party	3
Bijdragen ruimtelijke ontwikkelingen	Contributions to spatial developments		'Voluntary' contributions to spatial developments elsewhere in a municipality. These contributions cannot be recovered under public law under the current Wro.	5
Bovenwijkse voorzieningen	(Infrastructural) provisions that benefit multiple areas, listed in 6.2.5 Bro of the current Dutch legislation		(Infrastructural) provisions that benefit multiple areas, listed in 6.2.5 Bro of the current Dutch legislation	13
Bovenplanse kosten/verevening	Equalization		Equalizing the positive results of one land exploitation with the	13

			negative results of another land exploitation.	
Aanvullingswet/-besluit Grondeigendom	Supplemental Land Property Act /degree		New legislation that is part of the Environment and Planning Act and deals with, inter alia, land ownership and cost recovery matters	70
Kostenverhaal	Cost recovery		The settlement of costs for public works and facilities	13
College van B&W	College of mayors and aldermen		Daily management of a municipality, consisting of the mayor and aldermen	55
Ambtenaren	Civil servants		Person who works for the government	6
Structuurvisie	Vision document		Policy document in which municipalities lay down their main spatial ambitions and vision at the future of the municipality. Often focused on the (medium) long term.	6
-	Community Infrastructure Levy	CIL	A non-negotiable planning charge to help deliver infrastructure in areas in Britain.	7
Profijt, proportionaliteit en toerekenbaarheid	Profit, proportionality and accountability	PPT-criteria	Three criteria with which DOs for off-site costs must comply under public law: the criteria of profit, proportionality and accountability in relation to the paying development	13

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# 1. Introduction

## 1.1 Motive

The land policy of Dutch municipalities is increasingly changing from active to passive, as a result of which the role of the government is moving from steering towards more facilitating (Muñoz Gielen, Salas & Cuadrado, 2017; Buitelaar & Bregman, 2016; Heurkens, 2013; de Zeeuw, 2018; Muñoz Gielen & Lenferink, 2018). Since the financial crisis in 2008, active land policy, whereby municipalities acquire land, make it ready for construction and sell it afterwards, is under pressure (Buitelaar et al., 2016; Root, van der Krabben, Spit, 2015). The crisis in 2008 has shown that the exploitation of land by means of an active land policy entails major financial risks for municipalities (Needham, 2014; Buitelaar et al. 2016). Municipal land exploitations namely entail many assumptions and uncertainties (Segeren, 2007; Buitelaar, 2010a). Insight into the sensitivity of municipal finances to changes in land development has, together with a strengthening of the instruments for cost recovery in the Dutch Spatial Planning Act [Wet Ruimtelijke Ordening, Wro] in 2008 (Dinteren & van der Krabben, 2008), led to an increasing trend towards passive land policy in Dutch municipalities. As a result of this shift, municipal costs incurred for investments in public provisions can no longer be included in the land price, making legal options for recovering costs at private landowners increasingly important.

One of the instruments for recovering costs of public provisions at the involved private parties in area development is through DOs for off-site costs. DOs are contributions from project developers and landowners when public land use decisions increase the economic value of their land (Muñoz Gielen & van der Krabben, 2018). Off-site refers to recovering costs of provisions that benefit several areas or provisions that are fully attributable to a certain development, but are realized outside the plan area (Sorel, et al., 2014). In addition, equalization between several developments also belongs to off-site costs. DOs for off-site costs are used by Dutch municipalities to mitigate development impacts, to improve the spatial quality of areas and to realize social functions (Van Baardewijk, 2019). Under private law municipalities can request contributions related to area-specific costs (*gebiedseigen kosten*), infrastructural provisions that benefit multiple areas (*bovenwijkse voorzieningen*), ‘voluntary’ contributions to spatial developments (*bijdragen ruimtelijke ontwikkeling*) or equalization (*bovenplanse kosten/verevening*) (van der Heijden, Muñoz Gielen, Nijland, 2019). It is important to make a distinction within these categories between cost recovery on one hand and financial contributions to spatial developments on the other hand (Zandvliet, 2019). Cost recovery refers to work performed by a government associated with certain developments. On the other hand, financial contributions are specifically intended for quality improvements in a municipality. Municipalities can use the DOs for off-site costs to save money for certain expenses. Via private law there are not that much requirements for using DOs for off-site costs, except that the link between the contributing developments and the municipal expenses must be included in the municipal vision document (van der Heijden et al., 2019). DOs for area-specific costs, equalization and for infrastructural provisions that benefit multiple areas can also be included under public law. Hereby DOs for off-site costs must meet the criteria profit, proportionality and accountability [PPT-criteria] (van der Heijden et al., 2019). In addition, infrastructural provisions that benefit multiple areas must be included in the cost category list of Article 6.2.5 of Besluit Ruimtelijke Ordening [Bro] (Overheid.nl, 2019a).

## 1.2 Problem statement

The existing use of DOs for off-site costs is far from ideal in the Netherlands (Muñoz Gielen, 2017). Under private law, the recovery of the obligations via private law agreements involves uncertainties about the enforceability and in particular about the conditions within which and the scope of costs that can be recovered (Muñoz Gielen, 2017). Research of BVHRuimte (2013) and BVHRuimte (2014) shows that there is often a lack of clarity about the link between the contributing developments and the DOs for off-site costs and that the expenses are often unclear, despite the fact that those who work in the public sector must justify the fact that they consume public money in an effort to make decisions which will lead to a more desirable future (Moore, 1978; Campbell & Marshall, 2002). Sometimes DOs for off-site costs are even paid for provisions that will not be realized at all, or the contributions are used for other purposes than those stated initially (Noord Hollands Dagblad, 2019; Ennis, 1996). As a result, negotiations between municipalities and private developers can get stuck and the preparation of spatial projects can be delayed (BVHRuimte, 2014; De Groot, 2009).

Dutch municipalities ask DOs for off-site costs for a wide variety of purposes, calculated through a variety of calculation methods (BVHRuimte, 2013; Muñoz Gielen, Nijland & van der Heijden, 2019). This results in a variation in the amount of DOs that municipalities ask and its distribution among various cost bearers. As a consequence, developers are faced with a proliferation of different types of approaches and charges in different municipalities which have evolved in an ad hoc manner. For developing parties, DOs for off-site costs may therefore feel like a matter of arbitrariness, which can lead to uncertainty and inequality (Gemeente Tilburg, 2015; BVHRuimte, 2014). The uncertainty about whether the municipality will modify the land-use plan, and under which conditions, does not help private parties to arrange the necessary financing as well (Muñoz Gielen & Lenferink, 2018). As a result of the problems described above, the legitimacy of DOs for off-site costs in private law agreements can therefore be put into question. Legitimacy is *'the justified, legally, politically recognized and socially acceptable right to exercise authority'* (Bokhorst, 2014, p. 20).

The need for greater consistency is clear with the likelihood that DOs for off-site costs will play a more significant part in municipalities in the future. Research by Vereniging Nederlandse Gemeenten [VNG] (2019a) shows that an increasing number of Dutch municipalities use the law articles 6.13 paragraph 7 Wro (contributions for equalization of area developments) and 6.24 paragraph 1 Wro (contributions to be agreed under private law for specified spatial developments), which are both related to DOs for off-site costs. In addition, via Amendment Ronnes adopted by the House of Representatives in October 2019, a far-reaching successor to the current article 6.24 paragraph 1 has appeared in the EPA, regarding contributions to spatial developments (overheid.nl, 2019c, Hendriksma, 2019). The adopted Amendment Ronnes enables Dutch municipalities to enforce these contributions to spatial developments under public law in de EPA, while under the current legislation these contributions can only be agreed on under private law (Ollongren, 2019; overheid.nl, 2019b, overheid.nl, 2019c, Hendriksma, 2019). Amendment Ronnes thus provides an expansion of the enforceability of DOs for off-site costs under the EPA in the Netherlands, which will be further discussed in paragraph 4.7.2 of the research. As a consequence of this legal change, the legitimate boundaries of DOs for off-site costs have engendered much debate in the Netherlands. The primary aim of the research is therefore to gain insight into how the legitimacy of DOs for off-site costs in private law agreements can be enhanced in the Netherlands. An additional goal of the study is to explore the problems that arise when working with DOs for off-site costs in practice, together with gaining more insight into the acceptance of these DOs by private developers. In view of the problem definition, that the

existing use of DOs for off-site costs is far from ideal in the Netherlands, the central question of the research is as follows:

*How can the legitimacy of developer obligations for off-site costs in private law agreements be enhanced in Dutch municipalities?*

The following questions help to answer the main question:

1. *Which factors influence the legitimacy of developer obligations for off-site costs in private law agreements?*
2. *What problems with regard to the legitimacy of developer obligations for off-site costs (can) arise before, during and after the negotiations for concluding a private law agreement?*
3. *How can these problems with regard to the legitimacy of developer obligations for off-site costs in private law agreements be solved, both from the perspective of municipalities and private developers?*

The research focuses, in particular, on the issue of the legitimacy of DOs for off-site costs in private law agreements. Municipalities have more possibilities and freedom to ask DOs for off-site costs in private law agreements, than under public law. In addition, the Dutch planning practice is characterized by concluding private law agreements to arrange cost recovery and additional contributions. Furthermore, the problems described above seem to be particularly apparent under private law, as a result of which this research focuses on private law agreements in particular.

### **1.3 Scientific relevance**

This study adds four main contributions to the existing literature. Firstly, this study is in line with earlier scientific literature about whether or not to standardize and regulate negotiable DOs [NDOs] posteriorly. Some studies mention that DOs are a local matter, with context playing an important role in obtaining these obligations. According to Muñoz Gielen (2014), DOs at the local level can be based on specific policy and identified and estimated costs, in contrast to models based on regional and national assumptions. In addition, there are researchers who demonstrate that the time needed to negotiate agreements on a development-by-development basis can cause delay and unfairness (Ennis, 1996). Since Britain has started to regulate DOs more since 2010 through the introduction of the CIL, a non-negotiable planning charge to help deliver infrastructure in areas (Lord, Dunning & Dockerill, 2018), similar processes of standardization and posterior regulation of NDOs have been observed in other countries (Muñoz Gielen & García, 2016; Muñoz Gielen & Lenferink, 2018). This trend raises the question if the Netherlands will work towards a further regularization of NDOs as well (Muñoz Gielen & Lenferink, 2018). By examining how the legitimacy of DOs for off-site costs can be enhanced in the Netherlands, this study will also lead to insights into the problems that arise when working with these kind of DOs. In addition, the research leads to insights about the acceptance and experiences of DOs for off-site costs by private developers. Based on this, insight is gained into whether there is a need for further regulation of NDOs in the Netherlands.

Secondly, this research contributes to gaining insight into the justification and legitimization of DOs for off-site costs. Various researchers point out that planning is justified by the provision of public goods (Moore, 1978; van der Krabben, 2009). Nevertheless, planning is not only justified by offering public goods, but also by the way local authorities deliver these public goods and how they charge these public goods (Ennis, 1996). Various researchers focus

on the question of what justifies planning (Moore, 1978; Klosterman, 1985; Tromp, 2002; Verhoest, Verloet, Bouckaert, 2003). However, little attention has been paid to the way in which the use of DOs for off-site costs can be legitimized, as formulated by Ennis (1996) ‘*How do developers know that money given to local authorities will be spent on the specified purpose?*’ Or questions such as how local authorities deal with the possibility that the DOs received cannot be used anymore for the indicated provisions, because they are canceled? (Muñoz Gielen, 2013). Research into how the legitimacy of DOs for off-site costs can be enhanced, can lead to new scientific insights into how these types of problems can be solved or prevented. This study therefore contributes to an understanding of the measures that municipalities at local level can take to enhance the legitimacy of the DOs. In addition, the research encourages those involved to think more critically about the use and deployment of DOs for off-site costs.

Thirdly, most researchers who deal with DOs for off-site costs have conducted their research from the perspective of the government. Previous studies on this subject, for example, examine the extent to which DOs can function as a financial source for financing ‘large’ public infrastructure, since active land policy is not so profitable anymore (Muñoz Gielen & Lenferink, 2018). Or on the question which types of expenditures municipalities recover from ‘financial contributions to spatial developments’? (Muñoz Gielen et al., 2019). Research by BVHRuimte (2014) examines to what extent the requested contributions from municipalities fit within the legal framework of the Wro and research of Lord et al. (2018) concludes that CIL provides less financial resources for municipalities than the negotiable way of s106 in Britain. The legitimacy of the government's actions with regard to DOs for off-site costs is only dealt with to a limited extent in these studies. This study therefore places DOs for off-site costs in a broader perspective, by also taking into account the developers’ perspective on the obligations municipalities can request. As a government, it is namely not only important to get sufficient financial resources, it is also important to justify and legitimize your actions towards all parties involved (Moore, 1978; Campbell & Marshall, 2002). This is mainly essential since local authorities and developers are interdependent: local authorities need developers for the realization of certain goals and developers need municipalities for planning permission (Van Duijvendijk, z.d.). When DOs for off-site costs are high, governments may be able to recover more costs from developers, but the viability of area developments may also be jeopardized (Muñoz Gielen & van der Krabben, 2018). As a result, these parties cannot be viewed separately from each other.

Lastly, this study is in line with the scientific article written by Woestenburg, van der Krabben and Spit (2019) about legitimacy dilemmas in direct government intervention. They examine the legitimacy dilemmas that arise from local governments' direct policy and market interventions in the case of public land development. The basis for this study, in comparison with the article by Woestenburg et al. (2019), is that local governments not only face legitimacy problems with public land development, but also in the case of passive land policy by working with DOs for off-site costs. As a result, this study examines among other things which legitimacy problems can occur with the use of DOs for off-site costs in private law agreements and thus builds further on the scientific article by Woestenburg et al. (2019).

In short, there seems to be a lack of studies looking at the legitimacy of DOs for off-site costs and studies that examine these DOs broader than just from the perspective of the government. Not only in the Netherlands, but also in foreign countries like Britain, as formulated by Monk, Crook, Lister, Lovatt, Ni Luanaigh, Rowley and Whitehead (2006, p.11): ‘*The extent and scale of variations of s106 (NDOs) and their legitimacy is often unknown*’. The need for greater

consistency and coherence is clear with the likelihood that DOs for off-site costs will play a more significant part in municipalities in future.

#### **1.4 Social relevance**

This study also contributes to the development of new insights that can be applied in practice. Enhancing the legitimacy of DOs for off-site costs is important now that the public sector is becoming increasingly dependent on private parties in area development in the Netherlands, as a result of the shift from active to passive land policy (Heurkens, 2013; Buitelaar et al., 2016; Muñoz Gielen, Salas & Cuadrado, 2017; de Zeeuw, 2018; Muñoz Gielen & Lenferink, 2018). Insight into the legitimacy of DOs for off-site costs is essential to ensure that negotiations between municipalities and developing parties do not stagnate. Research by Muñoz Gielen (2017) has shown that negotiations between municipalities and developers to regulate financial resources still take a long time and lead to high (transaction) costs. This is partly due to the lack of effectiveness of prior coordination between the various parties (Muñoz Gielen, 2017). These problems may only get worse since many municipalities focus especially on inner-city area developments. Developments at these locations are generally more expensive (Buitelaar, 2018), leaving in general less financial room for developers to pay the requested DOs for off-site costs. This may delay negotiations between municipalities and private developers even more. Understanding how the legitimacy of DOs in private law agreements can be enhanced is therefore essential for increasing the efficiency and effectiveness of negotiation processes and for strengthening the bond of trust between municipalities and developers. By enhancing the legitimacy of the DOs for off-site costs, developers will be more likely to accept them. In this way the effectiveness and efficiency of the negotiation processes can be increased and the lead time of developments can be shortened (De Groot, 2009). This is particularly important in view of the current housing shortage in the Netherlands, which makes accelerating developments more urgent (VastgoedActueel, 2017; Rli, 2018; Capital Value, 2019)

Additionally, several municipalities in the Netherlands are considering working with DOs for off-site costs, among which the municipality of Ede and the municipality of the Hague (gemeente Ede, personal communication, 2019; gemeente Den Haag, personal communication, 2019). Various questions that these municipalities have regarding DOs for off-site costs have to do with the question how they should deal with the expectations of developers, for example when provisions for which developers have paid do not go ahead (gemeente Ede, personal communication, 2019). Research into enhancing the legitimacy of DOs for off-site costs gives these municipalities more insight into how they can deal with these types of issues. In this way, the research can help these municipalities to make a well-considered choice as to whether or not to use the instrument, and as soon as they decide to deploy these obligations how they can use DOs for off-site costs in a legitimate way.

Lastly, research into the practice of DOs for off-site costs is particularly relevant in the Netherlands, because of current discussions about the use and legitimate boundaries of DOs for off-site costs. These discussions occurred in light of the law-making process of the new EPA in the Netherlands. In April 2019 it was decided that the current practice under Article 6.24 paragraph 1 Wro, more specific the possibility for requesting contributions to spatial developments, will be continued under the EPA (Rus-van der Velde, 2019; Fokkema, 2019). This makes it possible for municipalities to make private law agreements with developers in which contributions to spatial developments elsewhere in the municipality are included (Fokkema, 2019; Van Baardewijk, 2019). As mentioned earlier in the introduction, Amendment Ronnes was additionally adopted in October 2019, as a result of which

contributions to spatial developments can also be enforced under public law under the EPA (Ollongren, 2019; Overheid.nl, 2019b). As a consequence of this legal change, the legitimate boundaries of DOs for off-site costs have engendered much debate in the Netherlands. Reference is also made here to the ‘abuses’ of the DOs for off-site costs under current legislation (Zandvliet, 2019). As a result, it is important to gain more insight to the current practice of DOs for off-site costs. Not only to be able to make any recommendations for the further elaboration of the EPA, but also to give municipalities more clarity about the use of the instrument.

### **1.5 Reading Guide**

This research is made up of six chapters, of which this introduction forms the first chapter. Chapter 2 sets out the theoretical framework of this research that serves as the basis for the empirical research. This chapter discusses the definition and the different approaches of legitimacy, both the normative and empirical approach. This is followed by a paragraph which takes a closer look at the four dimensions of legitimacy: the political, ethical, social and legal dimension. The next paragraph of the theoretical framework elaborates on value capturing and the widening scope of DOs for off-site costs. Finally, this chapter discusses the trend of post-regulation of NDOs for off-site costs in other countries in more detail and ends with a conceptual framework, in which it is illustrated how the legitimacy of DOs for off-site costs is formed by the four dimensions of the concept. In chapter 3 the research methodology of this study is explained. It argues, among other things, the choice of the case studies in the research. This chapter also explains choices regarding the research strategy: interviews. Subsequently, the empirical part of the research, the research results, is discussed in chapter 4. The results of the interviews with municipalities, developers and other relevant actors are analyzed and described in this chapter. In chapter 5 conclusions are drawn. Lastly, in chapter 6 the limitations of this research are discussed and recommendations are made for follow-up research.

## 2. Theoretical framework

### 2.1 The multiplicity of legitimacy

#### 2.1.1 *Legitimacy as a contested and multidimensional concept*

The concept of legitimacy is variously interpreted within the literature, as a result a frequent problem in research on this subject is that how legitimacy is understood is not adequately explicated (Parkinson, 2003; Prosser, 2010; Tirion, 2006; Suchman, 1995). In addition, there is a lot of discussion among political and social scientists about the definitions and associated criteria of legitimacy (Bokhorst, 2014, p.10; Prosser, 2010; Hurrelmann, Schneider & Steffek, 2007). Despite the different definitions of the term, almost all of them refer to the acceptance or recognition of authority (Bokhorst 2014). One frequently used definition of legitimacy comes from Scharpf (1999), who describes legitimacy as the extent to which input politics, throughput processes and output policies are acceptable to and accepted by the citizenry. Nevertheless, legitimacy does not always have to be analyzed from a citizen's perspective, since other stakeholders can be involved as well. Developers for example have a direct interest in government policy regarding DOs for off-site costs (Campbell et al., 2000). In this light, Tirion (2006) uses a broader and policy-oriented definition of legitimacy and suggest that in relation to policy, legitimacy is the acceptability of policy for those involved. This concerns the extent to which the policy is considered as correct, justified or acceptable by those involved (Tirion, 2006, p.93). Given that this definition in particular omits the legal and political side of legitimacy, this research is in line with the broader definition of legitimacy used by Bokhorst (2014). In her research she defines legitimacy as '*the justified, legally, politically recognized and socially acceptable right to exercise authority*' (Bokhorst, 2014, p. 20). Legitimacy is thus determined by the extent to which power is ethically justified, legally justified, politically recognized by all, and socially accepted by involved subordinates.

Several dimensions of the concept of legitimacy can be deduced from the definition of legitimacy by Bokhorst (2014). This definition shows that legitimacy consists of four different dimensions, namely an ethical, legal, political and social dimension (Figure 2.1). The ethical dimension is quite subjective and concerns the extent to which regulation or policy is considered as justified (Bokhorst, 2014). The legal dimension of legitimacy concerns the extent to which actions or policy are in line with the applicable laws and regulation, which can be referred to as legality (Bekkers, 2007; Dijkstra, Joosten, Stamhuis & Visser, 2016). This dimension shows and highlights that legitimacy is rooted in the notion of the (democratic) rule of law. The content of the law, rules, procedures and standards that we consider important in the context of the rule of law can be both material (substantive) and procedural (process oriented) rules and thus partly determines legitimacy (Bekkers, 2007). Nevertheless, some other authors also emphasize that just legality is not sufficient for legitimate policy or action (Gribnau, 2001; Bokhorst, 2014). Fundamental standards, such as legal certainty and legal equality, can sometimes not be guaranteed by law (Gribnau, 2001) and do not automatically lead to the acceptance of actions or policies by involved subordinates. Bokhorst (2014) therefore distinguishes a third dimension of legitimacy, referred to as social legitimacy and determined by the extent to which actions or policy are accepted by those to whom it applies. Finally, the political dimension can be distinguished, which is about the degree to which standards have been recognized by all, which is often associated with democratic legitimacy (Peter, 2017).

Figure 2.1 Four dimensions of legitimacy

Political legitimacy (democratic legitimacy)	Legal legitimacy (legality)
Social legitimacy	Ethical legitimacy

Source: author, based on Bokhorst (2014)

These four different dimensions ensure that legitimacy is a multidimensional concept that is often interpreted differently in both theory and practice. Van Ostaaijen & Schaap (2012, p. 93) for example focus in particular on the political dimension of legitimacy. On the other hand, Hoogerwerf and Herweijer (2008, pp. 84-85) only focus on the social dimension of legitimacy and Gilley (2006) focuses on the legal and ethical dimension of legitimacy. Not all the definitions of legitimacy include all four dimensions of the concept. In addition to the fact that these individual dimensions of legitimacy can reinforce each other, they can also undermine each other (Bokhorst, 2014). In this way, contrasting dimensions of legitimacy can create legitimacy problems. This is what Woestenburger et al. (2019) call first order legitimacy dilemmas: legitimacy problems that result from inconsistencies within the legitimacy of direct government intervention itself.

Although many scientific researchers focus on just one or a few dimensions of legitimacy, all four dimensions are desirable and fundamental to legitimacy (Bokhorst, 2014). The discussion that exists on this mainly concerns the question to what extent all dimensions are necessary. Political and legal legitimacy are, in particular, seen as formal dimensions of legitimacy, which are inextricably linked to a democratic constitutional state. The informal ethical and social dimensions of legitimacy are desirable, but not necessary according to Bokhorst (2014). However, without widely accepted and shared views on justice and social acceptance, the formal acceptability of laws, rules and policies comes under pressure. In addition, authors regularly see the political and social dimension as one (Bokhorst, 2014). Nevertheless, the formal political recognition that citizens entitled to vote regularly give to those eligible does not always have to correspond with the social acceptance of actions or policy by those affected (Black, 2009). Regarding DOs for off-site costs, it is plausible that society has a different view of the topic than developers for example, who are much more directly confronted with the impact of these obligations. This contradiction also indicates potential first order legitimacy problems in direct government action. According to Bokhorst (2014), the ethical dimension of legitimacy remains the most subjective, but may also be seen as the most fundamental.

### 2.1.2 Legitimacy motives

According to several authors, all forms of government intervention must be legitimized (Woestenburger et al., 2019; Campbell & Marshall, 2002; Moore, 1978; Coglianese, 2007). This is based on various motives in the literature, also called legitimacy motives. Blatter (2013) distinguishes three different motives for achieving legitimacy. First of all, he argues that achieving legitimacy is important for the well-being of citizens. In addition, he argues that legitimacy can be sought for creating political stability, which is in line with the articles of Tait (2012) and Bokhorst (2014), in which they state that a lack of legitimacy can lead to distrust, which can undermine the acceptance of power. A third legitimacy motive that can be

distinguished is the view that legitimacy is a means to achieve certain goals. Involved subordinates are more likely to comply with rules which are considered as legitimate by involved stakeholders (Bokhorst, 2014). Legitimacy thus primarily becomes a source of effectiveness and efficiency. As Moore (1978) points out, legitimacy can reduce the time and therefore the costs of planning.

In addition to the three legitimacy motives mentioned above, more arguments can be distinguished for the sake of legitimizing government action. Coglianese (2007) emphasizes, for example, that governments possess their powers in a uniform and monopolistic way, which makes it necessary to justify the practice of exercising such a huge, monopolistic power. The similar importance of legitimizing government action was also mentioned a few decades ago by Moore (1978), by emphasizing that those who work in the public sector consume public money and resources in an effort to make decisions that will lead to a more socially desirable future, which requires some kind of legitimacy.

Although these legitimacy motives primarily focus on why government action should be legitimized and its importance, a distinction can also be made in argumentation about how government action can be legitimized. The argument that planning and government intervention are legitimized by serving the public interest has long dominated scientific research (Tait, 2012; Campbell & Marshall, 2002; Moore, 1978; Alexander, 2002). The legitimization of government intervention and spatial planning has rested on the proposition that state intervention in land and property development is necessary to safeguard the public interest against private and sectional interests since the second world war. Despite the fact that this way of legitimization has been widely supported, the legitimacy of spatial planning based on the public interest is increasingly disputed (Thomas and Healey, 1991; Taylor, 1994; Tait, 2012). Definitions of this term are often vague or controversial and planning results are often diverse and controversial, which may call into question the existence of a public interest (Alexander, 2002). As Tait (2012) describes, planning has no customer group on behalf of whom it acts. Spatial planning has always been characterized by a certain interaction between governments and actors from both the private sector and society (Hanssen, 2013), which makes it difficult to formulate a public interest to use for the legitimization of government action.

Additionally to the public interest as a legitimizing concept for government intervention, it is generally acknowledged that the delivery of collective goods is also one of the core tasks of governments, which legitimizes its actions as well (Anomaly, 2015; Holcombe, 1997; Moore, 1978). These types of goods are not or not efficiently delivered by the market and characterized by non-rivalry and non-exclusivity (Holcombe, 1997; Anomaly, 2015; Moore, 1978). Non-rival means that the use of a product by person A is not at the expense of the use of the product by person B. Non-exclusive means that nobody can be excluded from the use of the good (Holcombe, 1997; Anomaly, 2015; Moore, 1978). Because this type of goods will be under-produced or not produced in the private sector, government intervention is needed (Holcombe, 1997). In this way local authorities try to prevent market failures, which legitimizes their actions as well.

## **2.2 Two approaches: legitimacy as both a normative and empirical concept**

Many authors have developed useful operationalizations of the concept of legitimacy. In general, two main approaches can be distinguished: a normative and an empirical approach to the concept of legitimacy (Wallner, 2008; Bokhorst, 2014; Peters, 1986, p. 63; Schmidt, 2013). Both approaches will be elucidated in this section.

### 2.2.1 Normative view of legitimacy: legitimacy can be obtained

The classical normative approach to legitimacy finds its roots in the identification of relevant normative criteria to formulate a coherent, objective framework with factors that together contribute to legitimacy (Noyon, 2017). This approach assumes that legitimacy can be obtained by meeting several criteria, which is helpful for conceptualizing legitimacy. Central within this approach is the question how regulators or authorities should acquire legitimacy (Bokhorst, 2014).

Various researchers have investigated the concept of legitimacy on the basis of normative criteria (Schmidt, 2013; Scharpf, 1970 in: Bokhorst, 2014). A well-known approach to legitimacy based on normative criteria is the distinction between input and output legitimacy of Fritz Scharpf from the 1970s (Bokhorst, 2014; Schmidt, 2013). According to Scharpf (1999, pp. 7–21), input legitimacy refers to the participatory quality of the process that leads to rules and laws that are enacted through electoral representation institutions. This form of legitimacy is based on the principle of 'government by the people' and consists of the degree of involvement of relevant actors in a decision-making process, whether represented in public bodies or through direct involvement (Stolk et al., 2018; Woestenburg et al., 2019). Various studies show that input legitimacy can be determined by on the basis of criteria such as authorization, representation, accountability and in terms of an entity's responsiveness to citizens' concerns as a result of people's participation (Hartmann & Spit, 2016; Hendriks, Ostaaijen & Boogers, 2011). Input legitimacy can also arise when those who make decisions are democratically elected (Stolk et al., 2018), which seems to be specifically related to the political dimension of legitimacy. On the other hand, output legitimacy is related to the problem-solving quality of laws, rules and policy outcomes and can be generated by effective and efficient action (Bekkers, 2007, pp. 38-41; Stolk et al., 2018; Schmidt, 2013). Mena and Palazzo (2012, p. 14) and Scott (2001) add that output legitimacy can also be strengthened by compliance with current rules and regulations, which is specifically related to the legal dimension of legitimacy. Improving the input participation or policy output can increase the legitimacy of certain policies or actions (Schmidt, 2013).

Moreover, government actions can also be justified in a normative way on the basis of what happens between input participation and output effectiveness: the so-called throughput legitimacy (Schmidt, 2013). Schmidt (2013) was one of the first scholars that put this third category of legitimacy forward, with special attention to what is called '*the black box of governance*', referring to the process side and the forms of legitimacy that can be acquired in the system itself (Bokhorst, 2014). Throughput legitimacy consists of processes with relevant stakeholders and can be defined in terms of certain quality requirements such as transparency, predictability, efficacy, accountability, inclusiveness and openness to interest mediation (Stolk et al., 2018; Schmidt, 2013). Government actions can be legitimized through throughput legitimacy when stakeholders involved have actively participated in a process that was effective, responsible and transparent (Schmidt, 2013). Nevertheless, throughput legitimacy cannot be viewed separately from input and output legitimacy: all must be viewed in conjunction (Woestenburg et al., 2019). When throughput legitimacy is not considered as legitimate, the perception of the legitimacy of government action is often undermined, regardless of how extensive the input is or how effective the output is (Schmidt, 2013). Yet there are still many researchers who focus primarily on one of these approaches to legitimacy. According to Campbell et al. (2000), planning must be for example assessed on what it delivers in the end, which refers specifically to output legitimacy and omits the other two approaches. As they state: '*planners have no basis for legitimate action if the outcome seems unfair*' (Campbell et al., 2000, p. 307). The normative criteria that together determine or

influence legitimacy according to the studies mentioned in this paragraph are added to Table 2.1.

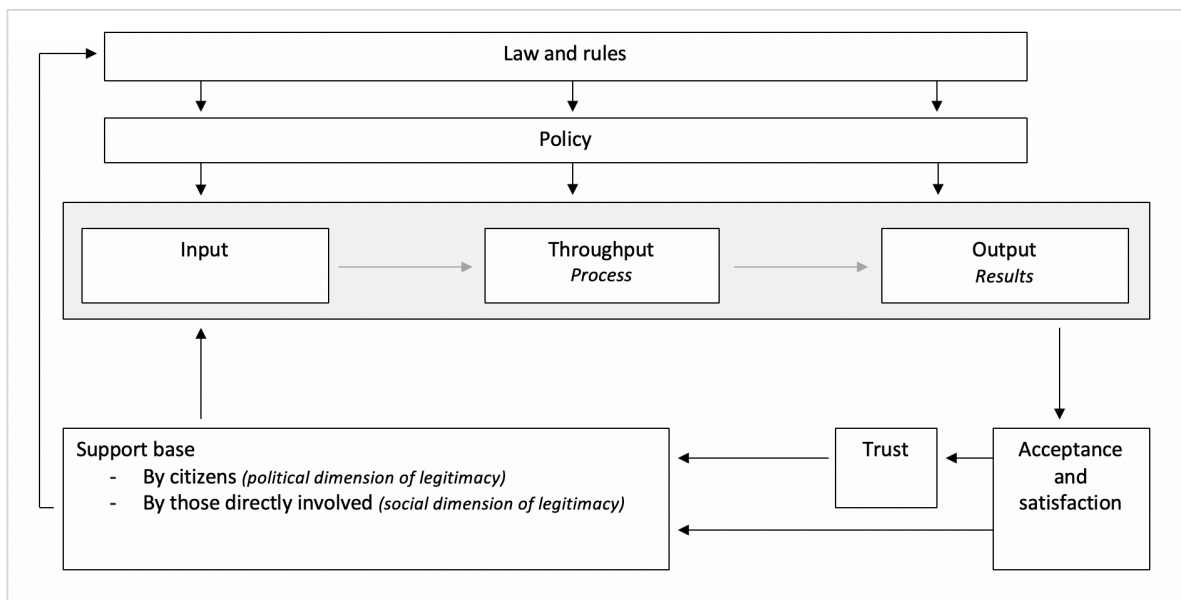
Table 2.1 Overview of normative criteria that influence the legitimacy during different phases: before, during and after the process

Type of legitimacy	Criteria
Input legitimacy	Participative quality, democracy, involvement of actors in the decision-making process, representation, authorization, expertise
Throughput legitimacy	Elaboration, effectiveness, predictability, accountability, openness, accessibility, transparency, open for mediation of interests, justice
Output legitimacy	Effectiveness, efficiency, in accordance with legislation, policy and rules, practicability, enforceability, comprehensibility, clarity, added value

Source: author, based on the literature of Schmidt (2013), Bokhorst (2014), Scharpf (1999), Stolk et al. (2018), Hartmann & Spit (2016), Hendriks, Ostaaijen & Boogers (2011), Bekkers (2007), Scott (2001) and Mena & Palazzo (2012)

Figure 2.2 shows that laws and rules can influence the input, throughput and output of a measure or actions, whether or not indirectly through the intervention of policy. Based on the normative criteria for legitimacy within these different stages, trust, acceptance and satisfaction can be built up which in turn provides support for certain actions or measures (Ministry of the Interior and Kingdom Relations, 2010; Tyler, 2006; Weyers & Hertogh, 2007). As pointed out in section 4.1.2, satisfaction with the outcomes, political trust and support are important to keep a system up and running and for achieving political stability (Bokhorst, 2014; Blatter, 2013), which creates a cyclical approach to legitimacy (Figure 2.2).

Figure 2.2 The legitimacy cycle



Source: author, mainly based on literature of Bokhorst (2014), Tyler (2006), Blatter (2013), Weyers & Hertogh (2007) and Ministry of the Interior and Kingdom Relations (2010)

Within this normative approach to legitimacy it is important to realize that inconsistencies may occur, which can also be referred to as first order legitimacy problems (Woestenburg et al., 2019). According to Bokhorst (2014), legitimacy problems arise where the normative expectations of those involved are not in balance with the extent to which authorities can and want to achieve these expectations.

### *2.2.2 Empirical view of legitimacy: a variety of legitimacy experiences*

The empirical approach to legitimacy can be distinguished from the normative-scientific approach (Noyon, 2017; Black, 2009; Peters, 1986, p.63; Bokhorst, 2014). One of the first advocates for this approach was Max Weber (Tyler, 2006; Hinsch, 2010; Bottoms & Tankebe, 2012). Unlike the normative approach, where the central question concerns how regulators or government institutions should gain legitimacy, the empirical approach to legitimacy focuses on why and when involved stakeholders experience legitimacy (Bokhorst, 2014). In this way, legitimacy can be seen as a largely subjective and psychological concept, found in people's perceptions and beliefs with regard to the actions and behavior of others (Peters, 1986, p.63). From this approach, legitimacy can therefore be seen as a social construction that depends on the experience of others (Black, 2009).

When legitimacy is seen as a perception, legitimacy is mainly the result of assessments by the involved parties about the correctness of certain actions or outcomes (Suddaby, Bitektine & Haack, 2017). When an individual, company or a party has a reference scale or goal in mind, any perceptions of legitimacy are influenced based on these comparative ideas, based on previous experiences or examples (Suddaby et al., 2017). Within this approach, the area around its own point of view or interest forms a latitude of acceptance and the perceived legitimacy thus cannot be viewed separately from emotional processes. Given that the field of spatial planning is characterized by a diversity of parties, views and interests (Tait, 2012), this leads to a variety of judgments about legitimacy on micro level (Suddaby et al., 2017). As a result, some authors have emphasized that legitimacy can be attributed to multiple parties and individuals with heterogeneous expectations (Voronov, De Clercq, & Hinings, 2013). Although the research of Woestenburg et al. (2019) mainly refer to legitimacy problems that arise in the case of active land policy, this research seems to show that legitimacy problems can also occur in the case of passive land policy. Legitimacy problems may arise as a result of inconsistencies within the four dimensions of legitimacy: the legal, political, social and ethical dimension. An action can for example be in line with the current rules and legislation, but not accepted by the involved market party. In this example there are contradictions between the legal and social dimension of legitimacy.

This paragraph shows that legitimacy is not a matter of black or white (legitimate or not), as the normative approach suggests, but can be experienced differently by different actors or in different contexts (Oosterhout, 2001). As a result, it is important to realize that there is no definitive theoretical answer to the question under which conditions legitimacy is created (Oosterhout, 2001), despite the fact that the normative approach to legitimacy assumes that a government institution can actively acquire legitimacy (Bokhorst, 2014). It is important to realize that the distinction between the normative and the empirical approach to legitimacy is ideal. This means that it concerns two 'pure' forms that in reality will rarely be adhered to. Often legitimacy is approached and seen as a hybrid form that is colored in by both approaches of legitimacy (Noyon, 2017; Krajewski, 2001). The normative view of legitimacy is hereby essential for understanding the empirical view of legitimacy (Buchanan, 2002).

### **2.3 A closer look to the dimensions of legitimacy**

In addition to Bokhorst (2014), who distinguishes four different dimensions of legitimacy, there are several other authors who discuss the different dimensions of legitimacy separately and in more detail. This section provides a closer look to the four dimensions of legitimacy, starting with the formal dimensions of legitimacy: legal and political legitimacy (Bokhorst, 2014).

### 2.3.1 Legality: legal certainty versus flexibility

A vitally important dimension of the legitimacy of DOs for off-site costs is the extent to which local authorities act according to the accepted (national) rules and procedures (Bokhorst, 2014; Curtin & Meijer, 2006). Some authors even argue that legality is assumed to be the prime basis of legitimacy in general (Mayntz, 2010). In Modern Western states the law has acquired functional autonomy within society, making the rule of law a dominant ideology (Cotterrell, 1992). In these countries the view prevails that governments are bounded by legal rules and exercise their power solely through the medium of such rules, which it is considered to have the authority to create through publicly recognized formal procedures (Cotterrell, 1992). In this way the law has not only been central in Western states as an instrument of power, but also for the legitimation of power.

However, the debate is no longer just about whether something is in line with applicable law, but also on the legitimacy of the law and rules themselves. For example, in the course of the years, scholars have developed various criteria that indicate when the law itself can be seen as legitimate. Finnemore & Toope (2001) for example argue that a law can be seen as legitimate when it produces rules that are generally applicable, which are coherent with other rules and when the law is publicized, so that it is findable and transparent for everyone. In addition, the law should exhibit clarity, determinacy and feasibility, seek to avoid ambiguities and be relative constant over time (Franck, 1990; Byers, 1999 & Finnemore & Toope, 2001). These criteria are in line with the well-known work of Fuller (1969). In his book *'The Morality of Law'* he describes bottlenecks around legislation, from which principles can be derived that good laws and rules must comply with to be legitimate. These principles for legitimate laws include the generality of rules, the familiarity and publicity of rules, the stability of rules, no changes that are too fast or too frequent, the clarity of the rules for those who have to follow them, the internal consistency of rules, absence of contradictions and as last the possibilities to follow the rules. Rosanvallon (2011) adds that impartiality by the implementation of the laws is also particularly important for achieving legitimacy. Laws that adhere to the values mentioned above, are more likely to generate a sense of obligation and generate behavioral change, than laws which ignore these values (Fuller, 1969; Postema, 1991).

The practice of DOs in the Netherlands and in Britain two decades ago show that the legal dimension of legitimacy, regarding DOs for off-site costs, can cause several problems. While Bokhorst (2014) argues that problems can arise when legislation becomes too detailed, inflexible and restrictive (Bokhorst, 2014), research by BVHRuimte (2014) seems to show the opposite. The research of BVHRuimte (2014) shows that problems can also arise when legislation is unclear, not elaborated and undetailed. In the Netherlands the legislator has for example not clearly indicated what is meant by some types of DOs for off-site costs, among which contributions to spatial developments and the possibility for equalization. These types of contributions are not further elaborated or explained in the current Dutch Spatial Planning Act. This mainly results in confusion, overlap between the types of DOs and a proliferation of types of costs recovered under these terms (BVHRuimte, 2014). This is the same situation that Campbell et al. (2000) describe for the situation in Britain two decades ago, resulting in ambiguities and a variety of interpretation options of the legislation for DOs for off-site costs. As Campbell et al. (2000, p. 767) speak about: *'Confused nature of the legislative and policy frameworks'*. The uncertainties and inequalities that can arise from this, can also lead to the undermining of the legitimacy of the legislation itself or a reduction of the legal certainty of the law (Ennis, 1996; Buitelaar & Sorel, 2010). Buitelaar et al. (2010) emphasize in their work the tension that exists between legal certainty and flexibility. On one hand, control and the law should be based on rules that protect individual rights and the rights of the stakeholders

involved, in other words: the stakeholders involved should be certain of their defined rights, including the predictability of government action (Buitelaar & Sorel, 2010). On the other hand, the law should be able to facilitate new developments, considering the long-time horizon and dynamic character of area development (Flyvbjerg, 2007). This requires some form of flexibility. In the Dutch case, DOs for off-site costs are also supposed to have this dual function: they should offer flexibility for municipalities and legal certainty for the developers involved. Nevertheless, this does not always seem to be the case yet according to the research of BVHRuimte (2014).

### *2.3.2 Between political legitimacy, political authority and political effectiveness*

Political legitimacy is the second formal dimension of legitimacy and has common ground with legal legitimacy (Bokhorst, 2014). According to several authors, the legal and the political dimension of legitimacy cannot be seen separately, since ‘the rule of law’ is formed by the political order (Salet, 1994; Buitelaar & Sorel, 2010). Although Bokhorst (2014) defines political legitimacy as the extent to which standards, policy or rules have been recognized by all through democracy, political legitimacy is more complex according to several authors and often confused with other terms such as political authority (Buchanan, 2002; Winter, 2015). According to Buchanan (2002) a government has political legitimacy when it is morally justified in wielding political power, so actually to exercise a monopoly in the making, application, and enforcement of laws or policy. Nevertheless, political legitimacy is not the same as political authority according to Buchanan (2002). An entity or government has political power or authority if it is possessing political legitimacy (1) and when the entity has the right to be obeyed by those to whom the rules apply or to those in whose name and on whose behalf it is wielded (2). In other words; political authority, understood as including the right of the government to be obeyed, entails political legitimacy, but not always vice versa. Political legitimacy thus has to do with the normative sufficiency of the justification for the act of making decisions and imposing rules, but not always whether those should be obeyed by those to whom the rules applies.

In the past decades there has been an extensive debate among political scholars about political legitimacy, political authority and political effectiveness. While several authors argue that political legitimacy of entities is determined on whether the transfer of authority has happened in a democratic way (see Locke 1980 in Peter, 2017; Bokhorst, 2014 & Stolk et al., 2018), Kant (1999) places a critical side note on political legitimacy. He argues that political legitimacy does not always lead to effectiveness (Kant, 1999) or rational decisions. This is reinforced by the fact that political legitimacy is not restricted to the subject-specific domain; auto mechanics, butchers or bus drivers can acquire political legitimacy as well. On this basis it seems that a distinction can be made between political legitimacy on one hand and effective politics on the other hand. Kant (1999)<sup>1</sup> argues that entities still hold their political legitimacy on the basis of electoral democracy, even if the actions and outcome of the authority ceases to be legitimate or fail to be effective. One could say that the above suggests that political legitimacy involves a ‘double agenda’. On one hand it has to be based on an elective mandate (the agenda of representativeness) and on the other hand it has to follow a transparent means-ends logic (the agenda of rationality) (Hellström, 1997). As also pointed out by Buchanan (2002), complying with the rules does not necessarily depend upon whether those who impose them have the right to be obeyed, but rather upon the quality of the output and the reasons to comply. At the end of his article Buchanan (2002) concludes that when democratic

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<sup>1</sup> In his work Kant (1999) literally refers to legitimate and effective authority instead of political legitimacy. In light of the distinction that Buchanan (2002) makes between political authority and political legitimacy, the description by Kant (1999) also seems to be in line with political legitimacy. Therefore, this term is used.

authorization of the exercise of political power occurs, only those who are democratically elected can be legitimate. By making this statement, he nevertheless links political legitimacy and political (democratic) authority again, despite the fact that he mainly emphasizes the differences in his article. In addition, with this statement he indirectly shows that he sees political legitimacy the same way as Bokhorst (2014) a decade later, namely that the origin of political legitimacy can be found in democratic principles.

The major role of political legitimacy in spatial planning comes forward in the article of Campbell et al. (2000). They describe the tension between politics and professional judgements of planning practitioners in Britain, which have become more prominent recent years. Planning decisions are inherently political rather than based on the planning profession (Campbell et al., 2000). Considering this high degree of political influence on planning decisions, the notion of public interest still seems to have value in some countries, among which Britain two decades ago. In this sentence public interest is based on democratic institutions which legitimize adopted policies as being in the public interest (Alexander, 2002). Nevertheless, this high degree of political legitimacy can also lead to ethical dilemmas and resistance (Campbell et al., 2000; Zetter et al, 1997). As Zetter et al. (1997) argue, although in theory the political nature of planning activities has gained wide acceptance, in practice planning practitioners are often still reluctant to accept political legitimacy over professional ones.

### *2.3.3 Input for the perceived legitimacy of DOs for off-site costs*

The more informal and subjective dimensions of legitimacy, the social and ethical dimension, were theoretically discussed in paragraph 2.2.2. This paragraph described how perceptions of legitimacy are formed and created. In addition, this paragraph showed that the normative approach and normative criteria for legitimacy can influence the perception of legitimacy (Buchanan, 2002). This section deals with several problems and dilemmas that can arise working with DOs for off-site costs. In other words, the section will address some legitimacy issues that arise in other countries with working with off-site costs, with the greatest emphasis on Britain. As showed earlier, the practice of DOs for off-site costs can influence the social and ethical dimension of the legitimacy of DOs for off-site costs. The purpose of this section is thus to derive some criteria from previous studies that exert influence on the social and ethical dimension of legitimacy regarding DOs for off-site costs.

Much of the literature about DOs for off-site costs focuses on the situation in Britain about two decades ago (Campbell et al., 2000; Campbell & Henneberry, 2005; Crook & Monk, 2011; Ennis, 1996). Possibly because planning gain has long been used in Britain for infrastructure funding (Crook & Monk, 2011). According to these scholars, inconsistency and a lack of transparency are the main shortcomings of DOs for off-site costs in Britain. Policy objectives are often not clear and consistent, resulting in blurred relations between a certain development and the provisions that the municipality wants to realize (McAllister, 2019; Crook & Whitehead, 2002). A possible consequence is that the paid DOs for off-site costs does not always come back in or nearby the development which is paid for, in the form of certain provisions (Crook & Whitehead, 2002). DOs function in this way in particular as a redistribution policy in municipalities (McAllister, 2019). This can lead to resistance from involved stakeholders, since the willingness to pay of developers involved also depends on the relationship between the plan area and the provisions the municipality wants to realize (Crook & Whitehead, 2002). Based on this, it seems that the social dimension of legitimacy is likely to lose strength when municipalities mainly use their policy as a redistribution policy. Criteria such as transparency, a clearly established link between a development and the DOs

and clear transparent policy which is explainable thus seem to influence the social dimension or legitimacy regarding DOs for off-site costs.

In light of the redistributive nature of policy regarding DOs for off-site costs in some municipalities, Slack (2002) states that DOs for off-site costs that are the same per unit, regardless of where the unit is located, does not reflect the actual costs of a municipality and therefore does not lead to efficient development decisions. Just as Slack (2002) calls into question, there are distribution issues in several countries regarding DOs for off-site costs (Fox-Rogers & Murphy, 2015; Campbell et al., 2000; Crow, 1998; Campbell & Henneberry, 2005; Sence Turk, 2018). Campbell and Henneberry (2005) for example describe the variety of perspectives of planning practitioners in Britain about whether local authority planners should base their negotiating position on a financial appraisal of the profitability, development value or economic viability of several developments. This indicates a variety of views on the fairness of the distribution of DOs for off-site costs, which shows the pluralism of the ethical dimension of legitimacy (Jost & Major, 2011). Openness to interest mediation, as described by Schmidt (2013), therefore seems to be important for the ethical dimension of legitimacy.

Other issues and problems in countries as Britain arise regarding the implementation of the provisions for which the municipality has requested DOs for off-site costs. For example, Ennis (1996) wondered about the question how developers could know that their money given to local authorities will be spent on the specified purposes, putting the legal certainty of developers into question. Earlier research by Healey et al. (1996) has shown that a lack of financial resources may mean that the public sector or local authority cannot provide the proposed infrastructure at the time the developer is well advanced with his project. The cause of these problems can partly be found in the long planning horizon of certain projects or instruments (Flyvbjerg, 2007), as a result of which these are sometimes accompanied by large uncertainties (Spit & Zoete, 2015). Hereby the interim modification of projects or provision for which a municipality requests a contribution is encouraged. The scholars mentioned above also seem to suggest that among others in Britain policy formulation of DOs for off-site costs is a matter of 'muddling through'; a process of trial and error, as described by Lindblom in 1957.

Additionally, some authors even have doubts about the possibility of negotiating DOs for off-site costs. As Sence Turk (2018) argues, the use of voluntary agreements can lead to considerable differences in the amount of paid DOs, which can relatively easily lead to an uneven and unjust situation for private developers in an area. For the same reason, McAllister (2019) and Ennis et al. (1996) state that exceptions to the policy for DOs for off-site costs should only be acceptable if significant costs can be demonstrated within a particular development. Developers namely won't develop at a certain location if there is no business case (Mulder & Holt, 2018). So while the lack of profitability of a project may be a reason for not seeking to recoup all the costs to mitigate the adverse impacts of a development, according to Healey et al. (1996), the profitability of the project should not be a justification for seeking community benefits from a project which only has a small adverse impact to its surrounding. In this light and in the light of the redistributive nature of policy regarding DOs for off-site costs in some municipalities, there has been an extensive debate among several scholars in the past decades whether a (betterment) tax would not be a better alternative for DOs for off-site costs (Schep, 2012; Coleman & Grimes, 2010; Fensham & Gleeson, 2003). Also because the question is often whether the owner-users who also benefit from certain provisions contribute to these provisions to the same extent as developers in an area. As this study focuses on DOs for off-site costs, this alternative will not be discussed in detail in this research.

Although developers are not always willing to pay the DOs for off-site costs, especially when the relationship between contributing projects and the expenses is minimal, most of the developers still pay the obligations (Healey et al., 1996). The reason for this is that further project delays can be prevented in this way and to prevent planning permission from being compromised (Callies & Grant, 1991, p. 227,228). According to de Graaf, van der Brand and Verweij (2010, p.10), other location factors weigh more heavily by choosing a location to develop, than the DOs for off-site costs. Nevertheless, this does not alter the fact that such policy measures are often seen as a financial contribution in exchange for permission to develop, also referred to as payment planning (Healey et al., 1996; Curry, 1991). Disputes about the reasonableness and the legitimacy of the arguments brought forward end up in particular in court (Ennis et al., 2002).

## **2.4 DOs for off-site costs: underlying rationales and its widening scope**

### *2.4.1 The contentious nature of debates about DOs for off-site costs*

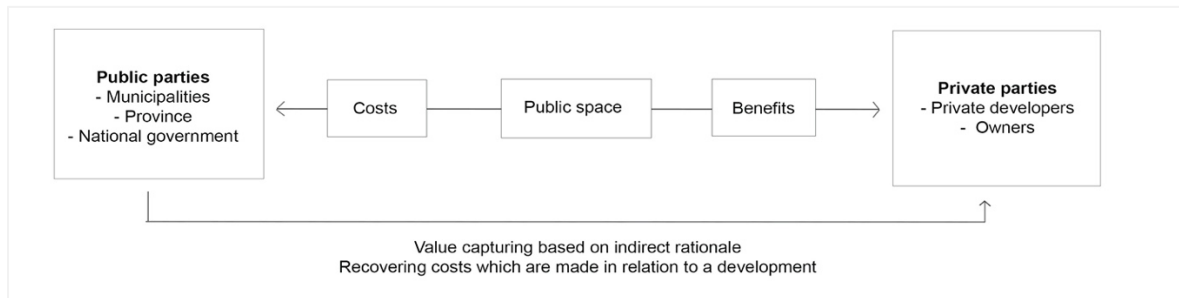
In the Dutch and English planning system, local planning authorities are responsible for setting out their land-use planning policies in development plans or vision documents and implementing them by, inter alia, deciding on DOs for off-site costs (Crook & Whitehead, 2002). DOs enable landowners to enter into obligations with local planning authorities whereby they bind their land, either by a private law agreement or under public law (Cunliffe, 2001). The general and classical purpose of DOs for off-site costs is to address problems which could not be solved through the use of planning conditions and thus allow developments to proceed where otherwise it would not (Campbell et al., 2000). Although this sounds fairly uncontroversial and straightforward, the subject of DOs for off-site costs and planning gain is perhaps one of the most contentious subjects within the planning literature and in the planning practice (Cunliffe, 2001; Whatmore, 1994, p.163).

Theoretically, in a completely free market, project developers would only take the private costs of a development and the costs for public provisions will be borne by the government (Munby, 1954, p.88). The low willingness of developers to pay for public provisions is the result of free-riders behavior, together with multiple (plan) areas that benefit from such provisions (Needham, 2014). Now that there is more and more a shift towards passive land policy in the Netherlands (Muñoz Gielen, Salas & Cuadrado, 2017; Buitelaar & et al., 2016; Heurkens, 2013; de Zeeuw, 2018; Muñoz Gielen & Lenferink, 2018), the revenues of developments increasingly lie with private parties. As a result, DOs are getting more important for municipalities, which are contributions from property developers and landowners when public land use decisions increase the economic value of their land (Muñoz Gielen & van der Krabben, 2018). Another possibility is that market parties (partly) realize public provisions themselves (Muñoz Gielen, 2009).

DOs for off-site costs are a value capture instrument in which the increase in land value that is generated differently than by direct investments from the owner, mostly by a change of the zoning plan, is used to cover costs related to area development (Smolka, 2015). From the Ricardian residual analysis of the land value, it follows that land value is determined by the type of land use (Buitelaar, 2010b). As a result planning decisions, such as granting permission for a change of the zoning plan, can lead to a fall or increase of the land value (Kruijt, Needham & Spit, 1990; Hepperle, Dixon-Gough, Mansbergerr, Paulsson, Hernik & Kalbro, 2017; Romana Medda & Modelewska, 2011). A fundamental question linked to this value increase, which provokes much debate among scholars, is the question to whom this value increase as a result of changing the zoning plan belongs (Chun Kwok, 1991, p. 18,19; Hepperle et al.,

2017). Several scholars see this value increase as an unearned revenue that should benefit society, a view that is also called direct rationale in science (Muñoz Gielen, Salas & Cuadrado, 2017). In addition, there are scholars who assume that the increase in value belongs in principle to the landowner, but the costs related to certain building plans (for example infrastructure), should be borne by the owner (Healey et al., 1996; Huisman, 2006). This is also called the indirect rationale (Muñoz Gielen, Salas & Cuadrado, 2017). Regarding DOs for off-site costs in light of the indirect rationale, projects that generate revenues should contribute to public provisions which are related to certain development plans of private parties, which is shown in Figure 2.3.

Figure 2.3. Value capturing based on indirect rationale



Source: Author

#### 2.4.2 A widening of the use and scope of DOs for off-site costs

The idea that governments regulate the market to minimize the negative effects of urban growth and private developments in surrounding areas is as old as the existence of spatial planning (Campbell et al., 2002; Campbell & Marshall, 2005). As stated in the previous paragraph, DOs were originally designed as a detailed procedural device to address problems which could not be solved in another way than by DOs, thus allowing developments to proceed where they otherwise would not (Campbell et al., 2000; Crook, 2016). Nevertheless, government policies related to DOs for off-site costs illustrate two general tendencies: a broadening of the range of DOs considered by municipalities (1), and a stretching of the relation between a development, its impact and the DOs for off-site costs (2) (Healey et al., 1996; Campbell, et al., 2000; Crook & Monk, 2011; Campbell & Henneberry, 2005; Punter, 1999; Alterman, 2012). According to Crook & Monk (2011), DOs for off-site costs have for example evolved in Britain by broadening it from the provision of basic infrastructure such as roundabouts and road access, to wider community benefits, such as open spaces and education. Additionally, DOs for off-site costs are being extended in Britain to the provision of affordable housing in some areas. In this way, DOs can be also considered as a key mechanism for achieving improvements in the quality of the urban environment (Punter, 1999).

Based on this widening of the use of DOs for off-site costs, Healey et al. (1992) distinguish three rationales for the practice of planning gain. More recent research into DOs seems to show that these three distinct rationales still seem to be valid. These competing rationales for the practice of planning gain are as follows:

- Planning gain as a contribution to implementing planned development (1)
- Planning gain as compensation and alleviation for the adverse impacts of development (2)
- Planning gain as a local development charge (3)

These three rationales can be used to justify planning gain. According to Healey et al. (1992), the categories are not mutually exclusive. DOs for off-site costs can or may be justified on more than one of these rationales. In practical use, one rationale can also evolve into another, for example when the limits of its justificatory power are reached (Healey et al., 1992). The first rationale mainly seeks to plan in advance through the plan to avoid certain adverse impacts, which entails a major role for the public sector. Rather than planning in advance, as the first rationale seeks to do, the second rationale aims to quantify the (social) costs of a development to ensure that these costs are alleviated or compensated by private parties in the form of DOs for off-site costs (Healey et al., 1992). As a result, the impact of each development has to be identified and addressed. This rationale is therefore also called the impact alleviation approach in some studies (Healey et al., 1996) and can therefore find its origin in the 'polluter pays' principle of environmental policy (Gaines, 1991; Stevens, 1994). Critical to this rationale is establishing a connection between a project and its impact, as well as finding a reasonable balance between the adverse impact generated by a development and the alleviation or compensation measures. Within the first rationale such links are often already established in the development plan (Healey et al., 1992). Finally, planning gain as a local development charge can be distinguished as rationale for the practice of planning gain. Within this rationale, each development has to pay DOs to contribute towards community development objectives, which is very similar to the direct rationale distinguished by Muñoz Gielen et al. (2017). This rationale can be redistributive in intention and can be related to the improvement of spatial quality. The justification for this third rationale can be based on social needs (Healey et al., 1992). The link between several provisions and developments within this rationale mainly lies in the duty or 'obligation' private parties have towards the community.

The broadening of the rationale for DOs as described earlier in this section, that is to say beyond concerns associated with adverse impacts of developments and the removal of development constraints, has been also accompanied by a change in the form of the DOs for off-site costs (Campbell et al., 2000). A classification of the form of DOs based on the scope is not yet included in the current scientific literature. Based on the literature of Healey et al., (1992), Healey et al. (1996), Campbell et al. (2000) and Muñoz Gielen et al. (2019), a categorization is made of different types of DOs for off-site costs (Table 2.2). These different categories mainly differ in scope. The types of DOs for off-site costs that can be distinguished are successively: DOs for provisions outside the plan area that fully belong to a certain development (1). The most common examples of this form are the realization of extra parking places outside the plan area or nature compensation because natural values are lost due to a certain development. Secondly, DOs that originate from the alleviation, compensation and counteract of the adverse impacts of multiple planning areas can be distinguished (2). Examples include the construction of a roundabout as a result of increased traffic flows caused by multiple developments. And a final category of DOs for off-site costs concerns costs that do not follow from the negative effects of developments, but arise from broader policy objectives related to spatial quality and/or social value (3).

Table 2.2. Different types and categories of DOs for off-site costs

	Type of DOs for off-site costs	Example(s)
1	DOs for provisions outside the plan area, that fully belong to a certain development.	<i>Parking not soluble within plan area itself, nature compensation</i>
2	DOs that originate from the alleviation, compensation and counteract of the adverse impacts of multiple planning areas.	<i>A roundabout to facilitate additional traffic flows due to multiple developments.</i>

3	DOs charged for provisions located outside of within the plan area, that do not follow from the adverse impact of spatial developments, but add spatial quality and/or social value.	<i>(Re)construction of a cultural centre, care and education, equalization between locations, a contribution to art in the public space</i>
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Source: Author

Characteristic of all the types of DOs in Table 2.2 is that it concerns costs that are made outside the plan area for one or more areas or costs that are made within the plan area but for the benefit of several plan areas. The first two categories can mainly be seen as cost recovery, while the third category is often regarded to as (voluntary) contributions. The opposite of these three categories are DOs for on-site costs. These are DOs that are fully related to a plan area and are also realized within this area. This form of DOs is therefore not included in the research.

## 2.5 The future of developer obligations for off-site costs

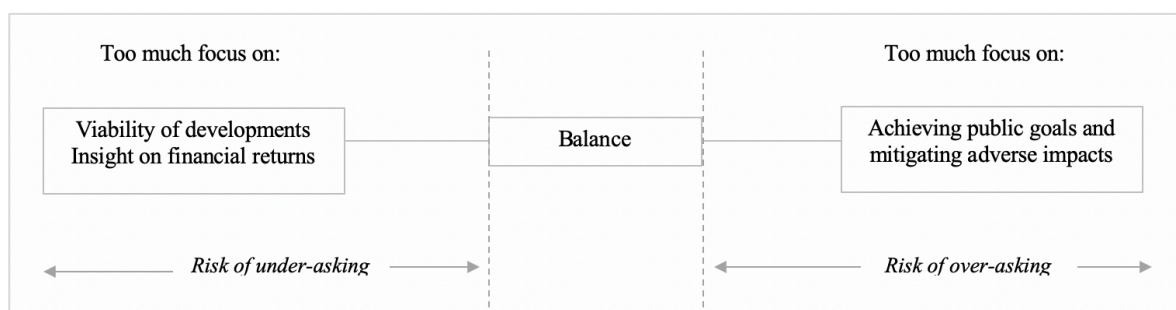
### 2.5.1. Location-related possible effects of DOs for off-site costs

The question remains which effects could occur for the planning practice, as a result of DOs for off-site costs. The conclusions about this question have been mixed, both in terms of the costs and benefits of these obligations (McAllister, 2019). There is a wide range of possible impacts of working with DOs for off-site costs, which can differ per location. Although most developers pay the DOs according to Healey et al. (1996) and Crow (1998), the situation seems to be far more complex in practice. Many scholars identify DOs for off-site costs as added costs to developments, which can have negative consequences for landowners or developers in terms of lower land prices or reduced profits for developers (Keogh, 1985; Debenham, Tewson & Chinnocks, 1988; Lock, 1990; Ennis, 1996; Healey et al, 1996; McAllister, 2019; Muñoz Gielen & van der Krabben, 2018). Some scholars even argue that DOs for off-site costs can have negative consequences for end-users, by increased property prices and rents (Ennis, 1996; Tsai, 2012). Nevertheless, there are also scholars who state that transferring the costs to the end users of the realized property is difficult, given that the costs for real estate are mainly determined by demand and supply (Tsai, 2012). As a result, property prices seem to come about primarily through supply and demand. When the balance between supply and demand is disrupted and there is a higher demand than supply, this often leads to more planning gain available for paying DOs for off-site costs (Crook & Monk, 2011).

Additionally, the viability of a development may be affected by DOs in some situations (Muñoz Gielen & van der Krabben, 2018). The viability of certain developments can be influenced by a range or combination of different factors, such as high abnormal costs as a result of land values, demolition costs, relocation costs, heavily contaminated land, when the site is difficult to develop or as a result of a certain building program (Huisman, 2006; Eastleigh Borough Council, 2008; Needham, 2014). In addition, Crook & Whitehead (2002) add that obtaining DOs is more difficult in unfavorable market circumstances. Although most of these factors are location dependent, research of Crook & Whitehead (2002) shows that DOs can be more effective at some locations than at others. Hereby they make a distinction between greenfield and brownfield locations. In general, the revenue potential of developments is often higher at greenfield locations than at brownfield locations (Buitelaar, 2018; Buitelaar, 2010b), making among other things DOs for social housing more effective at these locations (Crook & Whitehead, 2002).

According to de Groot (2012), the chance that developments will be realized by a developer is reduced when municipalities want to recover more costs than the revenue potential of a certain location, which can happen when municipalities focus too much on achieving public goals or mitigating the adverse impacts of developments without taking into account the viability of developments. Developers namely primarily focus on as much financial return as possible (Huisman, 2006; Brueckner, 1993, p.5). The other extreme, not asking DOs for off-site costs, may lead to developments taking place earlier (Eastleigh Borough Council, 2008), but can be at the expense of the spatial quality in several areas. This makes it important to find a balance between the public goals of a municipality on the one hand, without losing sight of the viability of developments on the other hand. The tension between the viability of developments on one hand and achieving public goals on the other hand is shown in Figure 2.4.

Figure 2.4. The tension between public goals and economic feasibility, with the risk of under- or over-asking regarding DOs for off-site costs as a municipality



Source: Author

### 2.5.2. Post-regulation of negotiable developer obligations

The question whether or not to standardize NDOs for off-site costs has led to much debate since England started to further regulate DOs through the introduction of the CIL: a non-negotiable planning charge to deliver infrastructure in areas (Lord, Dunning & Dockerill, 2018). Similar processes of standardization and posterior regulation of DOs have since been observed in other countries (Muñoz Gielen & García, 2016; Muñoz Gielen & Lenferink, 2018). The discussion, often speculative in nature, raises questions about the pros and cons and (possible) consequences of standardizing NDOs. Various scholars put forward arguments for whether or not to regulate NDOs (Ennis, 1996; Healey et al., 1992; Muñoz Gielen, 2014). Proponents or arguments for further regulation of DOs point at the time needed to negotiate for the conclusion of a private law agreement, which can lead to delays that can contribute to the costs for developers and local authorities (Ennis, 1996). These additional costs can have negative consequences for landowners in the form of a lower land price or for developers in the form of lower yields (Ennis, 1996; McAllister, 2019). In addition, a non-standardized approach encourages problems of uncertainty for developers and accountability problems on the part of the local government (Healey et al., 1992). Developers want clarity in the earliest possible stage of a development, for example about the amount of DOs they have to pay, when the provisions will be realized and how (Sorel et al., 2014). This requested certainty in advance does not always relate to the dynamic nature of the plans. According to Sorel et al., (2014), a standardized approach such as the CIL in Britain can offer the necessary flexibility: municipal flexibility in funding public provisions and facilities, while the certainty about the amount of the DOs is further increased in advance for developers. Lastly, Sorel et al. (2014) point out that the working method will become easier for municipalities when NDOs for off-site costs are more standardized.

On the other hand, there are also scholars who argue that local, non-standardized DOs can be based on specific policies based on identified and estimated costs, instead of general models based on regional and national assumptions (Muñoz Gielen, 2014). This makes it easier to align DOs for off-site costs to the context and location of a development. Additionally, a standardized approach of calculating the amount of DOs for off-site costs ensures that the criteria profit, accountability and proportionality can no longer be applied, as a result of which it is doubted whether standardization is desirable (Graaf et al., 2010; Lam, Bruijne, Sluysmans & Nijmeijer, 2012). Because a standardized contribution is independent of the costs actually incurred, municipalities face the risk that the DOs turn out to be too low or too high. Lastly, several scholars point out that the value capture in case of NDOs is often higher for municipalities than in the case of regulated and standardized DOs (Sence Turk, 2018). Based on the standardization of DOs in Britain by means of the CIL, it can also be concluded that the standardized way in general lead to fewer financial resources for municipalities than the negotiable way of s106 (Lord et al., 2018).

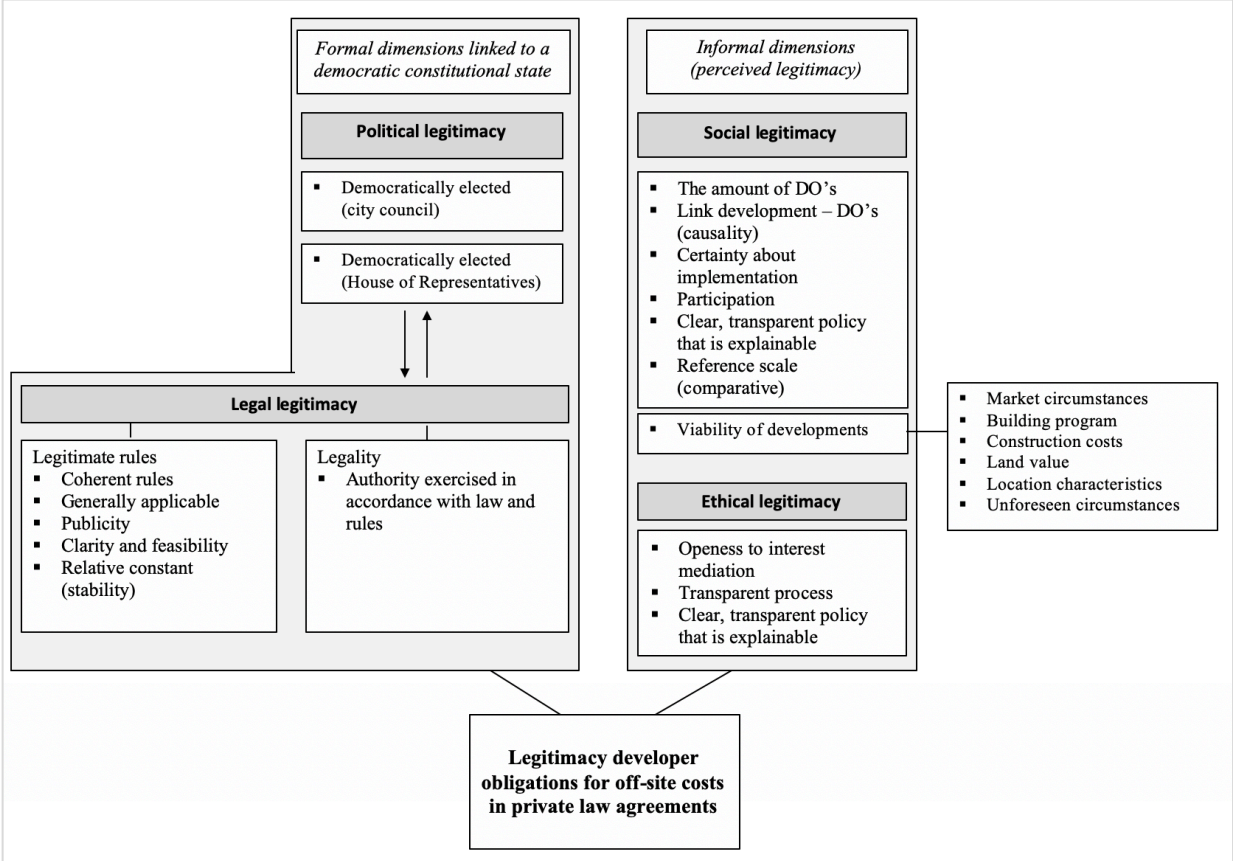
## **2.6 Conceptual framework**

The conceptual model has been derived from the theoretical framework. Herein, the theoretical concepts relevant to this research are interrelated and shown schematically (Figure 2.5). Central to the conceptual model is the legitimacy of DOs for off-site costs, formed by the different dimensions in which legitimacy can be subdivided: the political, social, legal and ethical dimension. Insight into the legitimacy of DOs for off-site costs in private law agreements is a first step in understanding how the legitimacy of DOs for off-site costs can be enhanced, which is the main question of this research. The legitimacy of DOs for off-site costs can be separated into the formal dimension of legitimacy, which is inseparably linked to a democratic constitutional state, and the informal dimension of legitimacy i.e. perceived legitimacy on the other hand. As Figure 2.5 shows, political legitimacy is formed by whether the transfer of authority has happened in a democratic way. Regarding DOs for off-site costs, this transfer is mainly important at the national and local level, by democratically electing the town council or the House of Representatives. Secondly, legal legitimacy can be distinguished in Figure 2.5, which is formed by both the legitimacy of the rules and law itself and the extent to which authority is exercised in accordance with law and rules. The factors that, according to several scholars, contribute to the legitimacy of rules and laws are included in the figure. Laws can be seen as legitimate when they are generally applicable, coherent with other rules and when the law is publicized, so that its findable and transparent for everyone. In addition, the law should exhibit clarity and feasibility, seek to avoid ambiguities and be relative constant over time.

On the other side of the model the informal dimensions of legitimacy are included, which can also be referred to as perceived legitimacy. From previous literature on DOs for off-site costs in Britain, social legitimacy on this subject seems to be determined in particular by the link or causality between a development and the requested DOs for off-site costs, the certainty about the implementation of the provisions for which the DOs are requested, participation beforehand, the amount of DOs and the extent to which the policy frameworks are clear, transparent and explainable towards developers. Additionally, the perceived legitimacy also seems to depend on the existence of comparative cases or a reference scale, for example based on previous experiences. Furthermore, social legitimacy also seems to be formed by the viability of developments, which is influenced by factors such as the building program, the construction costs and the market circumstances. Lastly the ethical dimension of legitimacy can be distinguished in the figure. This dimension is highly subjective and context-dependent, highlighting that legitimacy is characterized by a diversity of parties and views about what is

legitimate. When there are different views about legitimacy, openness to interest mediation can contribute in particular by enhancing the ethical dimension of legitimacy. Together, the political, legal, social and ethical dimension determine the legitimacy of DOs for off-site costs in private law agreements.

Figure 2.5. Conceptual model



Source: author

## 3. Methods

### 3.1 Research design

#### 3.1.1 *Interpretivism with characteristics of pragmatism*

The research questions, objectives and the underlying philosophical foundations that uphold the research field lead to the choice of a research philosophy (Burrell & Morgan, 1979). A research philosophy is a school of thought that guides the conduction of the research (Flowers, 2009). Each research philosophy has a distinct view of explaining reality (ontology) and what constitutes to acceptable knowledge (epistemology) (Guba & Lincoln, 1994; Saunders, Lewis & Thornhill, 2016). Hereby, the researcher must make some logical assumptions concerning the nature of society and science (Saunders et al., 2016). By going into this, the philosophical state of the research can be justified (Saunders et al., 2016). In addition, the hidden assumptions behind the methods used can be made clear (Farthing, 2016).

In order to address the main research question of this study, which is ‘*How can the legitimacy of developer obligations for off-site costs in private law agreements be enhanced in Dutch municipalities?*’, this research adopts mainly interpretivism, with a small pragmatic epistemological stance. Interpretivism seeks to explain contextual knowledge and the interpretation of reality by individuals based on experiences (Guba & Lincoln, 1994; Saunders et al., 2016). Interpretivism fits well within this study as the ontological position of this philosophy assumes that there are several realities, which are rich and complex and exists of a flux of processes, experiences and practices (Saunders et al., 2016). Regarding DOs for off-site costs in private law agreements there are also several realities. Within the applicable legal framework, each municipality has a lot of freedom to determine the way in which they charge DOs for off-site costs and to determine the provisions for which they are requesting the DOs. This makes the ‘reality’ of the subject out there complex and a flux of processes and practices, which allows different actors to view legitimacy and the way it can be enhanced differently. Theories and concepts are therefore too simplistic to understand the reality (Saunders et al., 2016). To come to acceptable knowledge, the research therefore focusses on different interpretations taking into account the importance of context. In this way the research contributes to new and more detailed understandings of the practice of DOs for off-site costs (Saunders et al., 2016). This fits within the epistemological position of interpretivism. Despite that interpretivism assumes that there is no single reality, the research tries to discover these ‘realities’ as close as possible by studying multiple case studies (Flyvbjerg, 2006), which will be further discussed in paragraph 3.1.2.

On the other hand, pragmatism fits within this study. Pragmatism is mainly concerned with action and change and the interplay between knowledge and action (Goldkuhl, 2012; Rorty, 1999). Pragmatism is suitable because the study seeks to develop knowledge which can be used to enhance the legitimacy of DOs for off-site costs in private law agreements in practice. This can be, for example, knowledge about how municipalities can use or ask DOs for off-site costs in a different way to enhance the legitimacy of these obligations. The base paradigm in this research is therefore interpretivism, allowing elements from the pragmatism paradigm.

#### 3.1.2 *Multiple case study*

As stated in the introduction, a lot is unknown about the legitimacy of DOs for off-site costs. It is not clear yet how the legitimacy of the DOs for off-site costs comes about and how developers experience these DOs. In addition, it is not always clear why municipalities choose a certain calculation method to determine the amount of DOs for off-site costs and what underlying motivations municipalities have to incur and recover certain costs. As a result, this

study is exploratory in nature by means of a multiple case study. Case studies namely lend themselves to examine 'how' and 'why' questions (Yin, 1989). By addressing five different municipalities as case studies, it is possible to obtain a picture as complete as possible of the daily practice of DOs for off-site costs in different municipalities, in contrast to a single case study. Furthermore, a multiple case study was chosen to reduce the chance of coincidence. It is possible that some municipalities have a totally different way of approaching DOs for off-site costs, for example by requesting completely different (amounts of) DOs than most of the municipalities. As a result, there can be major differences in the legitimacy of the DOs for off-site costs that different municipalities demand. Several case studies are therefore used in the study to reduce the chance of coincidence and exceptions, to get to a broader picture of the practice of DOs for off-site costs in this way.

In addition, in contrast to a single case study, reality can be approached as closely as possible by using multiple cases. A multiple case study namely enables the researcher to explore differences within and between cases, which is also pointed out by Baxter & Jack (2008), Yin (2003), Flyvbjerg (2006) and Swanborn (1996). As a result, a multiple case study can lead to different and sometimes even contradictory findings, enabling the researcher to place these findings in an explanatory perspective (Swanborn, 1996, p. 25).

Lastly, a multiple case study is chosen in this study, because of the limited size of the research group. The research group mainly consists of actors involved in negotiations for concluding private law agreements or actors involved in policy-making regarding DOs for off-site costs. Additionally, the research only covers municipalities that already work with DOs for off-site costs. Because of the small number of people involved with the subject per municipality, it is expected that there is only a small research group within a municipality. By means of a multiple case study, it is possible to approach a larger number of respondents, which increases the feasibility of the study.

### *3.1.3 Interviews*

The empirical data required for this study is obtained by conducting interviews. Qualitative research has been chosen for several reasons. First of all, the study is based on a relatively small research group, which also came forward in paragraph 3.1.2. Taking into account non-response, there is a chance that the research group will ultimately be too small to be able to attach statistical conclusions to the results. In addition, as emerged from the introduction, relatively little is known about the legitimacy of DOs for off-site costs, both how the legitimacy of DOs for off-site costs comes about and how the legitimacy of these DOs can be enhanced. Due to this exploratory character of the research, it is important that the perspectives and motivations of the interviewees can be traced, which is also mentioned by Saunders et al. (2016) and Scheepers et al. (2016). This can be done by conducting interviews.

In addition, following from the four different dimensions of legitimacy, both planning practitioners at municipalities, developers and some (legal) experts are part of the research. This makes it difficult to draw up a survey in which statistical conclusions can be linked to the results, since the questions that are important differ for both parties. Because previous studies on the subject are already based on quantitative methods or document analysis (Muñoz Gielen, et al., 2019; BVHRuimte, 2013; BVHRuimte, 2014), a qualitative study with more attention to context can be seen as a valuable addition to these previous studies. In this way more underlying information and in-depth insights can be obtained about the subject (Boeije, 2005, p. 21).

### 3.1.4 Semi-structured interviews

It was decided to conduct semi-structured interviews in the research. Given that this study is exploratory in nature, this type of interview offers the possibility of having the same subjects covered in all interviews, while additional questions can still be asked (Scheepers et al., 2016). It keeps the option of deviation open when respondents give different answers than expected (Baarda, Goede & Teunissen, 2001). In addition, semi-structured interviews were chosen because the respondents involved in the research have different functions. For example, one can think of planning practitioners who work with finance, policy makers and/or project leaders. One can stay at the core of the subject during the interviews, while specific and additional questions can still be asked by means of semi-structured interviews.

Lastly, the interviews are conducted face-to-face if possible, because observing body language can contribute to the correct interpretation of the answers. Besides, documents and other relevant data can be exchanged or displayed more easily this way.

### 3.1.5 Case selection

In this research a selection is made of five municipalities in the Netherlands. This selection is based on the method purposeful sampling, which means that it concerns a reasoned sample that is not based on coincidence (Hutjes, 1992; Doorewaard & Verschuren, 2007). The selection of the five municipal case studies is made on the basis of several criteria, based on 'maximum variation cases'. A maximum variation sample is constructed by identifying key dimensions of variations and then finding cases that vary from each other as much as possible (Suri, 2011; Flyvbjerg, 2006; Shakir, 2002). A maximum variation sample is chosen, because it is assumed that various factors can influence the outcomes of the research. These factors include for example the type of DOs for off-site costs, the potential yield of future developments and the size of a municipality, which will be further elaborated later on in this paragraph. To get a realistic and clear overview of the practice of DOs for off-site costs, the research takes these differences into account through the use of a maximum variation sample.

Essential for this research are municipalities that work with DOs for off-site costs. Because of this, first of all a selection is made of municipalities in the Netherlands that work with these DOs. Public documents, such as municipal vision documents or policy documents for DOs, are used to make this selection. In Dutch, the name of these documents are for example '*Nota's Kostenverhaal*', '*Nota's Bovenwijkse Voorzieningen*' and '*Structuurvisies*'. Prior to the interviews, it is assumed that the size of a municipality, the types of DOs for off-site costs and the potential yield of future developments in a municipality can influence the results of the research. It is assumed here that municipalities with a high potential yield from future area developments are more likely to request a higher amount of DOs for off-site costs compared to municipalities with a low potential profit. It is namely plausible that municipalities with a low potential profit of future developments should take more effort to attract developments at all. This is also in line with the research of Crook and Monk (2011), in which they state that scarcity in, for example, the housing market in general leads to more planning gain available for paying DOs for off-site costs (Crook & Monk, 2011). Because the potential yield of future developments in a municipality is difficult to determine, the heat map for the Dutch housing market of developer Bouwfonds Property Development [BPD] is used as an indication for this criteria (Appendix V). This map was drawn up on the basis of the number of housing transactions and single premiums from 2018, together with the predicted household development in municipalities up to 2027 (BPD, 2019). The map has a scale of 1 to 10, the higher the number, the higher the pressure on the housing market within a municipality. In the research number 1 till 4 relates to a low expected potential yield of future developments,

number 5 till 7 relates to a medium expected potential yield of future developments and number 8 till 10 relates to a high expected potential yield of future developments.

In addition, the study assumes that the size of a municipality may influence the results. Within the larger municipalities, most of the time more civil servants are involved with DOs for off-site costs than in a small municipality. As a result, the practice for requesting DOs for off-site costs may be more professional in large municipalities than in small municipalities. Furthermore, in a small municipality it is more likely that the relationship between the municipality and the developer is more informal than in a large municipality, as a result of which the legitimacy of DOs for off-site costs may be different than in a large municipality. Lastly, investments are assumed to be higher in large municipalities, as a result of which they are likely to be associated with more risk, which may influence the legitimacy of the DOs for off-site costs as well. For the classification of the size of municipalities, a connection was sought with the Vereniging van Nederlandse Gemeenten [VNG] (2019b). They define medium-sized municipalities as municipalities with 30.000 till 80.000 residents. All municipalities below 30.000 residents can therefore be considered as small. In addition, all municipalities with more than 80,000 inhabitants can be referred to as large municipalities.

Because of the assumed relations between the legitimacy of DOs for off-site costs, the type of DOs for off-site costs, the size of the municipality and the potential yield of future developments in a municipality, these three criteria were used to select the five case studies in the research (Table 3.1). Nevertheless, it is important to realize that these are only assumptions for the time being. A specification of the types of DOs for off-site costs with which the municipalities of the case studies work with is included in Appendix II. As further elaborated in paragraph 3.1.8, the names of the municipalities have been made anonymous in the study from an ethical point of view.

Table 3.1 Overview of the municipal case studies in the research

<b>Municipality</b>	<b>Size</b>	<b>Potential yield housing market*</b>
A	Mid-size	Medium
B	Big	High
C	Big	High
D	Small	Low
E	Small	High

Source: author, \*Based on *Hittekaart Woningmarkt 2019 of private developer BPD*

### 3.1.6 Reliability of the research

One important factor of scientific research is reliability (Boeije, 2005; Scheepers et al., 2016). Reliability refers to the absence of coincidental measurement errors (Scheepers et al., 2016). The role of chance, for example by choosing a very specific case, must be excluded as much as possible. As a result, a well-considered case selection is of great importance. Due to the explorative nature of this research and the diversity of policy documents regarding DOs for off-site costs at the local level, regarding reliability it was recommendable to include a relatively large number of case studies in the research. As a result, it could be prevented that the conclusion is too one-sidedly focused on just one, two or three specific cases. Instead, this research focuses on five different municipalities who work with a wide variety of types of DOs for off-site costs. Additionally, for the reliability it is important that the same subjects are questioned in an equivalent manner during the interviews (Scheepers et al., 2016). To guarantee this, topic lists were used during the interviews as guidance.

### *3.1.7 Validity of the research*

In addition to reliability, the validity of the research is also important, which means that the initial goal of the research is actually being researched (Scheepers et al., 2016; Farthing, 2016). Validity refers to the appropriateness of the methods used, accuracy of the analysis of the results and the generalizability of the findings (Saunders, Lewis & Thornhill, 2016). A careful selection of case studies is thereby, once again, essential. Additionally, the right questions must be asked during interviews, which depends on the operationalizations of concepts beforehand.

The validity of this research is guaranteed through intensive literature study and document analysis prior to the interviews. In this way, extensive contextual information could be obtained beforehand. As a result, context specific questions could be asked during the interviews and follow-up questions could adequately be asked, for clarification or in-depth information. Prior to the interviews, some exploratory conversations with experts and a few municipalities were held as well. Both increased the probability that the core of the research was touched during the interviews and that the subject of the research, DOs for off-site costs, could be discussed in detail. The validity of the research is also guaranteed by taking a test of the topic list prior to the interviews, which showed whether all topic and examples of questions are clearly formulated and that incorrect interpretations are excluded.

Furthermore, multiple interviews with different respondents per municipality are conducted when possible. Along with going through different data sources, as described in the previous alinea, the answers of the respondents are ‘checked’ for verification in this way. Afterwards the respondents had the opportunity to check the collected data by sending the transcripts for checking if desired. In this way incorrect answers given too quickly can be prevented in the research and the validity of the research can be guaranteed (Saunders et al., 2016 & Boeije, 2005).

In contrast to the internal validity, as described above, the external validity of the study is limited. The research is namely based on five case studies, or in other words: small samples (Scheepers et al., 2016). Although the results largely correspond with the quantitative studies of BVHRuimte (2013) and BVHRuimte (2014) and includes municipalities with a different size, different types of DOs and a different potential yield of future developments, there are limitations to the generalizability of the research. For example, only municipalities that actually work with DOs for off-site costs are included in the study. Nevertheless, there are still quite a lot of Dutch municipalities that do not work with DOs for off-site costs at all according to respondent 19. As a result, the study is not representative for the municipalities that do not work with DOs for off-site costs. In addition, although the study shows similarities with other countries such as Britain and with the previous studies of BVHRuimte (2013) and BVHRuimte (2014), every Dutch municipality still has its own local policy regarding DOs for off-site costs, as a result of which the (enhancement of the) legitimacy regarding DOs for off-site costs is highly context dependent. This limits the generalization of the findings. Despite, it is likely that the formal dimensions of legitimacy, the political and legal dimension, are a little bit more generalizable than the informal ethical and social dimension of legitimacy. The whole country namely has the same national laws and regulations regarding DOs for off-site costs and the same political system. On the contrary, the social and ethical legitimacy are highly subjective and context dependent (Bokhorst, 2014), making generalization difficult. Caution is therefore advised in the case of generalization and statistical generalization is definitely not possible in the study.

### *3.1.8 Research ethics*

Finally, research ethics played an important role in the research, as also pointed out by Scheepers et al. (2016) and Farthing (2016). Key in ethical research is handling the collected data with care and respecting the wishes of respondents. Within this research, attention to research ethics was paid in various ways. First of all, prior to the interviews the respondents were explicitly asked for approval to record the interview with an audio recorder. The intention of the recording was clearly stated: the accurate elaboration of the interviews. In addition, it has been indicated that the recordings will not be shared with third parties, with the exception of the case that the Radboud University requests evidence of the empirical data in the study. Secondly, respondents were asked whether the respondent preferred anonymity in the research. It was indicated that this anonymity could still be changed in a later stadium of the research. In case the respondents wanted to remain anonymous, the respondent's anonymous name or description was submitted to the respondent in question for approval. Thirdly, the respondents were asked if they wanted to receive the transcript of the interview prior to the data analysis, as a result of which they can indicate certain fragments that they do not want to be used in the report or make some corrections. Confidential information is of course not included in the thesis and not shared with anyone. Both types of requests, the desire for anonymity and not using certain parts of the interviews, were made by respondents during the research. These requests are respected and complied with. Finally, the transcripts of the interviews are only saved on the researcher's personal computer. Access to the transcripts is therefore strictly limited. As a result, ethical research is guaranteed.

## **3.2 Data collection process**

### *3.2.1 Research units*

Employees at the municipalities of the five case studies that are involved in the negotiations with developers for the conclusion of a private law agreement or making policy relating to DOs for off-site costs are especially important research units. Additionally, developers who have recently negotiated with the municipalities of the five case studies are also important research units in the study. In the research it has been chosen to interview both developers and municipalities. As follows from the theoretical framework, the social dimension of legitimacy is important in the creation of legitimacy regarding DOs for off-site costs, determined by the extent to which actions or policy are accepted by those to whom it applies (Bokhorst, 2014). By interviewing developers more insight can thus be gained into the social dimension of legitimacy. Additionally, in this way both the municipal and developer's perspective on DOs for off-site costs can be discussed and compared to each other in the research.

Prior to the empirical part of the research a list of possible contact persons from the five municipalities of the case studies is drawn up. This concerns employees who, for example, are involved in finance and land matters within the municipality. Project leaders were also added to this list, because they are often involved in negotiations with developers. Subsequently, attempts were made via the internet and via own network to retrieve primary telephone numbers and secondary e-mail addresses of these potential respondents. It has been decided to first try telephone numbers, due to the higher response through this form of communication. When seeking contact with potential respondents, the question was asked whether they are involved in asking or making policy for DOs for off-site costs and, if not, whether they know some people in the municipality who are involved. During the interviews respondents were also asked if they know some other employees in the municipality who could be relevant as well for the research. Additionally, the respondents were asked about recent negotiations with developers, and whether it was possible to get in touch with these developers. In this way a

so-called ‘snowball effect’ occurred, as a result of which contact could be made with the employees who are involved with DOs for off-site costs in the five case studies. However, this was not possible in all the municipalities of the case studies. In municipality A for example, only one person was involved in DOs for off-site costs in the municipality. In the end eleven respondents of the five municipal case studies were willing to participate in the study. A respondent overview is included in Table 3.2.

Other relevant research units are developers. In the research it was mainly attempted to interview developers who have recently negotiated in the municipalities of the case studies. Nevertheless, the policy regarding DOs for off-site costs was fairly recent in many of the municipal case studies, as a result of which negotiations were either ongoing or had barely taken place. Additionally, some municipal respondents indicated that the topic of the research is quite sensitive, which means they would rather not have that the developers with which they have recently negotiated are contacted for the research. This wish has been honored from an ethical point of view. In total three case-specific developers were interviewed in the study. Because of this low number, due to the reasons mentioned above, some not case-related developers were also interviewed about their experiences with DOs for off-site costs. In this way a better picture could be obtained of the social legitimacy of these DOs. The selected developers differ in size and in the region where they are active. Additionally, the selection of these developers was depended on the experiences they had with regard to DOs for off-site costs. Developers who indicated that they almost never encounter DOs for off-site costs, are not relevant to the research. In total, interviews were held with four non-case related developers (see Table 3.2).

Lastly, interviews were conducted with a jurist from an involved social organization, a lawyer in the field of area development and an expert in the field of DOs for off-site costs. In this way an attempt was made to gain more insight into, among other things, the legal dimension of legitimacy regarding DOs for off-site costs in the Netherlands. The interview with the expert in the field of DOs was held for a more general and independent view on the subject. This respondent was selected because of involvement in previous studies on the subject. The same applies to the jurist of the involved social organization and the lawyer. Both are actively involved in the discussions about DOs for off-site costs under the new EPA.

In total 18 interviews were conducted and 21 respondents were interviewed, of which two were only possible by e-mail. An overview of the interviews and interviewees can be found in Table 3.2. The names of the municipalities and respondents are made anonymous in this table, at the request of many respondents. A more detailed overview of the respondents, which also includes the types of DOs for off-site costs with which the municipalities work, is included in annex II.

Table 3.2 Overview of the respondents

<b>Municipality</b>	<b>Interview number</b>	<b>Respondent number</b>	<b>Function respondent</b>
Municipality A	1	R1	Finance and policy maker, planning practioner
Municipality B	2	R2	Policy maker, planning practioner
	3	R3	Employee finance & control (Interview via mail, not finished by respondent)
	4	R4	Developer within municipality B
Municipality C	5	R5	Policy maker, planning practioner

	6	R6	Finance, planning practioner
	7	R7	Employee finance & control (Interview via mail)
	8	R8	Developer within municipality C
Municipality D	9	R9	Project leader area development, planning practioner
	10	R10	Finance, planning practioner
		R11	Finance and policy maker, planning practioner
	11	R12	Developer within municipality D
Municipality E	12	R13	Finance, planning practioner
		R14	Finance, planning practioner
General developer I	13	R15	Developer
General developer II	14	R16	Developer
		R17	Developer
General developer III	15	R18	Developer
Expert DO's for off-site costs	16	R19	Finance, planning practioner
Involved social organization	17	R20	Jurist
Law firm	18	R21	Lawyer area development

Source: author

It is important to mention that the number of respondents per municipality are not the same. This is mainly due to differences in the number of employees involved in DOs for off-site costs in the municipalities of the case studies and differences in willingness to participate in the research.

### 3.3 Operationalization

#### 3.3.1 Operationalization legitimacy

Enhancing the legitimacy of DOs for off-site cost is central in the research. As followed from the theoretical framework, the concept of legitimacy variously interpreted within the literature. As a result, a frequent problem in research on this subject is that how legitimacy is understood is not adequately explicated (Parkinson, 2003; Prosser, 2010; Tirion, 2006; Suchman, 1995). In light of the multiple definitions and associated criteria of legitimacy, nearly all the questions of the interviews did not refer directly to the concept of legitimacy. In this way, it was tried to prevent that that the research became too much secondary to the variety of ways in which respondents define legitimacy.

As indicated earlier, legitimacy is defined in this research as *the justified, legally, politically recognized and socially acceptable right to exercise authority*' (Bokhorst, 2014, p. 20). The four different dimensions of legitimacy can be derived from this definition, namely the legal, political, social and ethical dimension of the concept. Although these four legitimacy dimensions are already defined in the theoretical framework, they are defined once again in Table 3.3 for the clarity and uniformity of the research.

Table 3.3 Definitions of the four dimensions of legitimacy in relation to DOs for off-site costs

Dimension of legitimacy	Definition in relation to DOs for off-site costs
Legal dimension	<i>The extent to which local authorities act according to the accepted (national) rules and procedures (in the current Dutch context the Wro/Bro) and the legitimacy of the laws and regulations themselves.</i>

Political dimension	<i>The extent to which standards, policy or rules have been recognized by all through democracy. Regarding DOs for off-site costs in the Dutch context, mainly the national level (the democratically elected House of Representatives) and the local level (the democratically elected town council) are important for the political dimension of legitimacy.</i>
Social dimension	<i>The extent to which actions or policy are accepted by those to whom it applies. In this research this concerns developers within a certain municipality to whom the policy for DOs for off-site costs applies and who negotiate with those municipalities for concluding private law agreements.</i>
Ethical dimension	<i>The extent to which regulation or policy is considered as justified, not only by developers, but also by for example civil servants and politicians.</i>

Source: author, definitions based on the theoretical framework

The conceptual model (Figure 2.5, p. 35) shows how these four dimensions together form the legitimacy of DOs for off-site costs. Additionally, the conceptual framework shows several criteria which follow from the theoretical framework and seem to influence the four separate dimensions of legitimacy. The conceptual model is therefore the basis of the research on which the different topics and example questions in the topic list are based. The following paragraph discusses the topic list in more detail.

### 3.3.2 Topiclist

Prior to the interviews a topic list was drawn up. A separate topic list has been drawn up for the municipal respondents, developers and the other respondents. The reason for this is that other questions are important for (for example) municipal respondents than for developers. In addition, the questions or topics meant for municipalities were not always applicable to the other respondents. However, the topics and the structure of the topic lists are largely the same, making it possible to compare the interviews with each other. The topic list used for the interviews with municipalities and for the interviews with developers can be found in the attachments III and IV.

First of all, a topic list has been drawn up for the municipal respondents. This topic list starts with an introduction of the DOs for off-site costs within the municipality, together with some topics/questions about the municipal policy regarding the subject. By first getting a detailed picture of the (types of) DOs for off-site costs the municipality in question work with, the rest of the questions can be asked more specifically. In addition, these general questions ensured that both the interviewer and the respondent talked about the same subject or types of DOs. These more general questions relate, for example, to the motive, goals, need and added value of the DOs for off-site costs within the municipality. Additionally, some organizational topics are included such as the departments involved and how the division of tasks between different employees or departments looks like. The topic list goes further into topics related to the policy of DOs for off-site costs. Examples of related topics include the amount of DOs, the calculation method used, uncertainties and the provisions for which the DOs are requested. This general introduction ends with asking for some examples of recent negotiations with developers that have taken place. In this way it is possible to refer to these examples in the following topics, which go deeper into the subject. The middle part of the topic list namely deals with topics related to the policy-making process, the negotiation process and the outcome of the negotiations. The purpose of these questions is in particular gaining more insight into the process side of DOs for off-site costs. Furthermore, the various dimensions of legitimacy are already addressed here in an indirect manner, for example by topics and a few example questions about the role of politics regarding DOs for off-site costs, their powers in relation to the subject and by asking about the procedure for establishing or updating the policy. In addition to these questions that relate in particular to the political dimension of legitimacy,

social legitimacy is also addressed indirectly in this part. For example, by topics referring to any criticism of developers on the subject or a topic about frequently asked questions by developers. The topic ‘implementation phase’, which follows thereafter, focuses in particular on the implementation of the provisions for which the DOs for off-site costs are requested and any problems that may arise.

The four dimensions of legitimacy are also included separately in the topic list for municipalities. The concept topics that go with this mainly follow from the theoretical framework and the conceptual model. For example, within the topic legal legitimacy reference can be made to the current legislation, any problems and ambiguities following from this current legislation, uncertainties about the legality of the requested DOs for off-site costs or previous lawsuits regarding the subject in the municipality. Hereafter the social dimension of legitimacy is discussed in more detail. Finally, a few more person-related and more subjective questions can be asked within the topic ‘ethical legitimacy’. For example, questions about the personal opinion of the respondent, such as when the respondent consider DOs for off-site costs as reasonable and fair. Within these topics respondents are also literally asked about the legitimacy of DOs for off-site costs and how the legitimacy of these obligations can be enhanced. In order to avoid confusion about the definition of legitimacy, respondents were first asked how they define legitimacy. Lastly, a few evaluation topics have been included in the topic list. Respondents were for example asked about eventual problems in the municipality regarding DOs for off-site costs, which factors contribute positively to obtaining the requested DOs and the influence of market conditions. Finally, a topic about the documentation of the DOs is included.

In addition to the municipal topic list, Annex IV contains the topic list used in the interviews with developers. This topic list starts with a topic about examples of recent negotiations with municipalities in which DOs for off-site costs were asked. Prior to the interview it was first explained what is meant by DOs for off-site costs. By first asking for examples, it was possible to refer to these examples during the other topics. The topic list then discusses the municipal policy regarding DOs for off-site costs in more detail. Developers were for example asked about the perceived transparency of municipal policy regarding DOs for off-site costs based on examples, but also about the predictability, publicity and accessibility of the policy documents in general. The factors contributing to the acceptance of DOs for off-site costs and the conditions under which they consider policy regarding DOs as fair are also discussed in this section of the topic list, followed by some question about the scope of the DOs. Subsequently, a topic about the negotiation process with municipalities is included. The topic list also elaborates on some personal topics, for example by questioning what the developer considers as reasonable and fair regarding DOs for off-site costs and how they experience the Dutch practice, where every municipality has a different policy, amount and types of DOs for off-site costs. These topics therefore address in particular the ethical and social dimension of legitimacy. Finally, it was asked more directly what they mean by legitimate DOs for off-site costs and how municipalities can enhance the legitimacy of the DOs for off-site costs they request. Nevertheless, again, the question was first asked how the respondents define legitimacy. The topic list concludes by overarching topics about experienced problems of developers with regard to DOs for off-site costs, together with possible effects.

In addition to the general topic lists for municipalities and developers in the attachments III and V, separate topic lists are used for the interviews with the lawyer specialized in area development, the expert of DOs for off-site costs and the involved social organization. Given the specific nature of the topics in these topic lists, from which the names of the respondents

or organizations could possibly be derived, these topic lists are not included in the appendix. Additionally, these topic lists were only used for one interview, in contrast to the general topic lists for municipalities and developers. Nevertheless, it is important to mention that the general topic lists for municipalities and developers were only used for guidance to ensure that the same topics were discussed in every interview. Context-dependent questions were also asked during the interviews. This means that prior to the interviews policy documents regarding DOs for off-site costs have been studied, as a result of which specific questions could be asked in the interviews and that reference could be made to these documents.

### 3.4 Analysis

The interviews are recorded as an audio file and transcribed afterwards. In this way all results could be processed accurately. The answers of the respondents are sorted by relevance for answering the main question and the underlying sub-questions. Various themes emerged from this, with the help of the program ATLAS.ti. Examples include '*the negotiation process*', '*the implementation phase*' and '*effects and consequences*'. Within the prepared themes, differences and similarities in the answers have been sought. Axial codes are based on this. The code tree that emerged from this analysis in ATLAS.ti can be found in Annex I.

One of the first things to notice when coding the interviews is the relatively large amount of similarities of the data, both from the interviewed municipalities and developers. These similarities represent the common thread of the entire research. During the coding it was also noticeable that most municipalities had difficulties in justifying the utility and necessity of the DOs for off-site costs. Because of this, the code '*utility versus necessity*' is included in the code tree, referring to the motives of municipalities for working with DOs for off-site costs and the use of these DOs. In addition, a comparison has been made between the planning policy regarding DOs for off-site costs in the five municipal case studies. As a result, the code '*planning policy for charging off-site costs*' is included in the code tree. Hereby it was not only striking that almost all respondents indicated the importance of having policy on the subject, the contrast between the static nature of policy documents on one hand and dynamic area development on the other hand was also clearly highlighted by most of the municipal respondents.

Overall, the four separate dimensions of legitimacy can also be distinguished from the collected data. As a result, the codes '*formal dimensions of legitimacy*' and '*informal dimensions of legitimacy*' have been included as codes in the code tree. These codes are subdivided into sub-codes that refer to the individual dimensions of legitimacy. These sub-codes are in turn subdivided on the basis of observed similarities and differences in the answers of the respondents. For example, the interviews seem to reveal a difference between the perceived social legitimacy of local and national developers.

Given the large amount of data about the negotiation process between municipalities and developers, it has been decided to include a separate code for '*the negotiation process*' in the code tree. After the codes '*effects and consequences*' and '*the implementation phase*', a last code follows about the future of DOs for off-site costs in the Dutch planning practice. During the interviews it was namely noticeable that several references were made to the new Dutch legislation under the EPA, which will enter into force in 2021. In addition, it was noticeable during coding that the Dutch practice of DOs for off-site costs shows quite a lot of similarities with the practice of DOs in Britain two decades ago, as followed from the theoretical framework. Because of this, it was decided to include a last code named '*the future of DOs for off-site costs*'.

## 4. Results

In this chapter the results of the eighteen interviews with twenty-one respondents are presented and analyzed. This includes interviews with five different municipalities that work with DOs for off-site costs, various developers, an involved social organisation, a lawyer and an expert in the field of cost recovery as followed from the previous chapter. The structure of the chapter is globally in line with the code tree, which can be found in Annex I.

### 4.1 Between utility and necessity

#### 4.1.1 Motives for using DOs for off-site costs

Based on the interviews, two types of municipal motives for using DOs for off-site costs can be derived: development-related motives and non-development related motives. Although DOs were originally designed to remove physical constraints on developments and to mitigate direct development impacts (Campbell et al., 2000), from the interviews it appears that this is not always the case anymore in the Dutch planning practice. The interviews show that in the case studies DOs for off-site costs are also used to improve the spatial quality of areas, for equalization between areas and to provide community benefits. Mentioned examples in the interviews include a bicycle storage at the station, high-quality public transport, the renovation of city parks, a climate-robust design of a road, a bat viewing place, the restructuring of a specific neighborhood, picnic places, quality improvements in the city center and the construction of quiet asphalt at some existing roads in the city. This broadening of the use of DOs for off-site costs, that is to say beyond concerns associated with adverse development impact and the removal of development constraints, is partly the result of changed market circumstances according to several municipal respondents. They indicate that since the financial crisis of 2008, DOs for off-site costs can be obtained more easily in general. As a consequence several municipalities of the case studies indicated that they reinitiated and revised their policy regarding DOs for off-site costs recently, partly due to a change in the profitability of developments.

Additionally, several planning practioners indicate that the current pressure on the housing market and the accompanying growth of the city can also be seen as a motive for the use of DOs for off-site costs. Planning practioners of municipality C for example argue that the city will grow in the coming years, as a result of which the public provisions must grow with the city. Nevertheless, it is striking that in previous research (for example Campbell et al., 2000) the broadened scope of DOs for off-site costs and its use is almost completely explained by the austere financial environment within which local authorities must operate, due to financial cutbacks. Therefore it is quite striking that this argument only came up once during the interviews, as respondent 1 states:

*‘The resources of the national government became increasingly constrained last years. The financial resources that we as a municipality get from the national government, are therefore shrinking (..)Without using DOs for recovering off-site costs at private developers, you can no longer maintain your spatial quality with these limited financial resources as a municipality.’ (R1, municipality A)*

A possible explanation for the absence of financial motives for the use of DOs for off-site costs can be found in the active land policy that several municipalities of the case studies still conduct, which is also a characteristic of Dutch land use planning (Buitelaar, 2010a). Active

land policy possibly reduces the dependence of municipalities on DOs for off-site costs, by providing financial resources for municipalities as well.

Furthermore, it is striking that instead of emphasizing the necessity of DOs for off-site costs, during the interviews particular reference was made to the general goals municipalities want to achieve with the policy. Most of the municipal respondents indicated that they mainly see DOs for off-site costs as a key mechanism to reach policy objectives and to strengthen or maintain the spatial quality within the municipalities, instead of mitigating the adverse impacts of new developments. Although some municipal respondents mentioned that there is a relation between the DOs for off-site costs they charge and the new developments in the city, concrete adverse impacts produced by developments in relation to the planned provisions were not mentioned in nearly all the interviews.

In addition to strengthen or maintain the spatial quality in the municipality, some other non-development related arguments for working with DOs for off-site costs were mentioned as well during the interviews. Examples of these arguments, which are even further removed from the necessity of these obligations, include the explanation that surrounding municipalities work as well with DOs for off-site costs or refer to the legal possibility to work with such contributions, as respondent 2 states:

*'The DOs for off-site costs we use are more based on the idea that we can do it according to legislation' (R2, municipality B)*

The nature of these non-development related motives for working with DOs for off-site costs seems to illustrate that some municipalities see the possibility for working with these obligations as a goal itself, instead of a means to achieve development-related goals such as the construction of a required roundabout. The great emphasis on non-development related motives in the case studies ensures that the necessity of charging these off-site costs at, among other things, developers can be questioned in some of these municipalities, based on the mentioned motives for working with DOs for off-site costs.

However, according to respondent 19 it is important to realize that not all the municipalities in the Netherlands work with DOs for off-site costs. There are still many municipalities in the Netherlands that do not work with these obligations, despite the fact that they have the opportunity from a legal point of view. As respondent 19 states:

*'From what I notice, also because of the research I did into the use of (infrastructural) provisions that benefit multiple areas in the G4, G40, in total about 50 Dutch municipalities, many municipalities are still not working with these DOs for off-site costs. (...) However, they do have the opportunity in the Wro.'* (R19, expert costs recovery)

Nevertheless, the research primarily focuses on municipalities that do work with DOs for off-site costs, as a result of which the study does not go into more detail about the municipalities that do not work with these DOs.

#### *4.1.2 Minimizing adverse impacts versus quality improvement: blurred boundaries*

As follows from the previous section, a distinction can be made between development-related arguments for the use of DOs for off-site costs and non-development related arguments. From the interviews it appears that in practice the boundaries between minimizing and alleviation

of the adverse impacts of developments on one hand and providing wider community benefits on the other hand, are not always clear in practice. This seems to be in contrast with the various rationales for the use of planning gain of Healey et al. (1992), which suggests that these rationales are clearly distinguishable. A possible explanation derived from the interviews can be found in the scale level of the policy for DOs for off-site costs. In nearly all the municipalities of the case studies, except municipality E, the policy for off-site costs covered the entire city instead of being disaggregated per development or area. This city-wide policy makes it plausible that it is difficult to establish the connection between certain developments and its impact. Partly because of this, the link between new developments in a city and the expenses of the paid DOs for off-site costs was not clearly present in almost all the municipalities of the case studies.

Additionally, the interviews seem to show that often multiple rationales for the use of planning gain (see Healey et al., 1992) can be applied, which is also mentioned in the article itself. Several respondents for example indicated that the city is growing by new developments, which means more provisions are needed. This is particularly in line with the second rationale distinguished by Healey et al. (1992): planning gain as compensation and alleviation for the adverse impacts of development. Despite, several municipal respondents indicated that the same amount of DOs for off-site costs is also intended to contribute towards community objectives or to improve the spatial quality within a municipality. This is more in line with the third rationale Healey et al. (1992) distinguished. Partly due to the equalization of DOs for off-site costs at the city level, which was the case in nearly all the municipalities interviewed, the different rationales for the use of planning gain seem to be more intertwined in the municipal case studies.

The interviews with planning practitioners also show that one rationale may evolve into another when all the planned provisions are realized. Planners from municipality D mention for example that after a while nearly no infrastructural provisions were left anymore in the municipality, so they turned the fund meant for infrastructure into a broader fund for spatial quality and equalization between areas. With this change, the underlying rationale for the practice of planning gain seems to have shifted from the second to the third (see Healey et al., 1992). That one rationale for the use of planning gain may change into another rationale, is also mentioned in the research of Healey et al. (1992). This finding seems to illustrate that some municipalities of the case studies see the possibility for working with DOs for off-site costs mainly as a goal itself, to which the costs to be incurred can be adjusted. As respondent 11 illustrates:

*‘They found out that we only have a few infrastructure projects, but we still had quite a lot of money once received from DOs for off-site costs. In addition, we were still asking that contribution during the negotiations. (..) So then we looked whether we could come up with a broader opportunity to use the DOs we charge for off-site costs.’*  
(R11, municipality D)

## **4.2 Planning policy on developer obligations for off-site costs**

### *4.2.1 Recovering off-site costs requires policy: an internal and time-consuming task*

All the respondents were unequivocally of the opinion that having policy on the subject should be a precondition for charging DOs for off-site costs. Respondent 2 of municipality B for example indicated that they do not have a policy document about the subject yet, but that they actually should. As explanation almost all the municipal respondents indicated that policy on

DOs for off-site costs has been a successful mechanism for counteracting arbitrariness. Several planning practitioners interviewed argued that before they had a policy on the subject, each developer within the municipality paid a completely different amount, which was largely based on arbitrariness. As respondent 1 and respondent 14 describe:

*'Having policy prevent yourself from having a certain arbitrariness, that you ask a certain amount in one situation and in another situation a completely different amount. (...) Previously we also agreed on the voluntary contribution to spatial developments, it was always negotiated, but we did not have a policy. That gave, and still gives, discussion. But, in the period that we didn't have it, it gave much more discussion.'*  
(R1, municipality A)

*'Talking about equality, that you treat every landowner the same way, something like a back-up is really important. Why does one developer pay that and the other developer that. Therefore, I think documentation of the DOs for off-site costs is really important'*  
(R14, developer)

This finding seems to suggest that the establishment of policy on DOs for off-site costs leads to a more equal treatment of developers and therefore less discussion. A possible explanation for the latter is also given in the literature of Crook and Monk (2011). They argue that the enhancement of the role of DOs in planning and development policy has simultaneously increased the transparency of such contributions, at least in general terms, so that they can be accurately included in the price paid for land. In this way the developers involved can already take the DOs for off-site costs financially into account in an early stage of the development. Nevertheless, this does not always seem to be possible in practice. Most of the developers interviewed indicated that the findability of the right policy documents is not always facile, so they usually work with experience numbers for estimating the amount of DOs for off-site costs.

Despite the need for municipal policy on DOs for off-site costs, almost all the planning practitioners indicated that the formulation of policy on the subject is time-consuming and intensive. As follows from the previous paragraph, the interviews seem to suggest that the use of DOs have increased since the end of the financial crisis. This is also illustrated by the new policy on the subject that nearly all the municipalities of the case studies have recently adopted. Despite the fact that the financial crisis is already a few years ago, as several municipalities described as motive for their new policy, most municipalities of the case studies adopted their policy this year or previous year. As a result market developments seem to be far ahead of policy on DOs for off-site costs. This is also emphasized by respondent 15, who works for a national developer. He indicates that municipalities and developers are often experiencing economic movements at a different time, where the latter experiences market fluctuations much earlier. Together with the time it takes to devise and prepare the policy according to several respondents, the policy for DOs for off-site costs often comes 'too late'. This means that at the time the policy is introduced, the market has already reached its best or worst point. For example, respondent 15 indicated that two years ago the market was better than it is now, while most of the municipalities of the case studies have introduced their new policies on DOs for off-site costs last year.

All municipal respondents indicated that the formulation of policy on DOs for off-site costs is primarily an internal matter, without participation of relevant actors such as developers. This seems to limit the input legitimacy regarding DOs for off-site costs based on criteria such as

‘participative quality’ and ‘involvement of actors in the decision-making process’ (Scharpf, 1999; Schmidt, 2013). Input legitimacy can namely be referred to as the participatory quality of the process that leads to policy, rules or laws that are enacted through electoral representation institutions (Scharpf, 1999). The participation in the formulation of policy on DOs for off-site costs mainly seems to take place internally, for example with different departments in a municipality.

#### *4.2.2 Policy as a local matter: a proliferation of policies at different places*

Within the Dutch national legislation municipalities have quite a lot of freedom in shaping their policy on DOs for off-site costs. As a consequence, the municipalities of the case studies seem to show that policy on DOs for off-site costs has evolved differently per municipality in an ad hoc manner. This is evident from the diversity of calculation methods and the differences in the amount of off-site costs the municipalities want to recover. For example, the amount of requested DOs for off-site costs in the case studies varied from about three thousand euros for a social dwelling in municipality D to amounts such as tens of thousands of euros as a contribution to spatial developments for detached houses in municipality A. Nevertheless, the latter is an exception and usually amounts around four or five thousand euros per dwelling were mentioned in the research, sometimes more for expensive homes, sometimes less for social housing. As a result of this diversity, it is not surprising that almost all municipalities in the case studies have laid down their policies in a different way. Some municipalities use a separate policy document for recovering off-site costs, while others pointed at a paragraph called ‘land policy’ in the multi-year land policy program from a few years ago. Another municipality referred to the multi-year urban plan, in which the expenditure of the DOs for off-site costs is anchored. This diversity of documents types at various places may contribute to the explanation of the difficulties finding the right documents that several developers interviewed experienced.

Not only the findability, but also the actuality of the policy seems to play an important role in the transparency and predictability of policy on DOs for off-site costs. As mentioned earlier, municipality B does not even have a separate policy document on the subject, while on the website numerous types of DOs for off-site costs are mentioned with which they have not been working anymore for a while. These ambiguities and confusion in the documentation of the DOs for off-site costs not only emphasizes the importance of having policy regarding DOs for off-site costs, but also highlight the importance of the accessibility, transparency and even actuality of the policy regarding DOs for off-site costs. Several municipal respondents indicated that especially the vision documents within the municipality are outdated, as a result of which problems may arise about the transparency of the expenses of DOs for off-site costs. Despite ‘actuality’ is not explicitly mentioned in previous studies about normative criteria for achieving legitimacy (Schmidt, 2013; Scharpf, 1999), it seems to be an important precondition for meeting the criteria of predictability and transparency.

From the large amount of criticism from the developers interviewed on the publicity, transparency, predictability, elaboration and comprehensibility of municipal policy regarding DOs for off-site costs, it can be deduced that these criteria seem to be important for the acceptance of policy by those involved. Despite the fact that many of these normative legitimacy criteria are particularly linked to throughput legitimacy in previous research (Schmidt, 2013, Scharpf, 1999 and Stolk et al., 2018), from the interviews it appears that these criteria are already important when drawing up policy documents in advance. For example, several developers interviewed indicate that the transparency, publicity and predictability of the documents can already exert influence at the perceived social legitimacy before the

process, mainly referring to the input legitimacy. As a result, in practice, the criteria for normative legitimacy do not seem to be strictly tied to input, throughput or output legitimacy, as is sometimes suggested in previous studies (Scharpf, 1999; Schmidt, 2013).

The variety of ways in which planning policy on DOs for off-site costs has developed in the Netherlands is also reflected in the multiplicity of types of DOs for off-site costs requested in the case studies. All types of DOs for off-site costs, as described in Table 2.2 (p. 31-32), have emerged in the case studies. Although impartiality is particularly important for achieving legitimacy (Rosanvallon, 2011), it appears from the interviews that there may be a relationship between the type of DOs for off-site costs municipalities ask for and the personal opinion of the policy makers to whom the increase in value of the land as a result of changing the zoning plan belongs. The policy makers in the case studies that work with voluntary contributions to spatial developments and/or equalization between developments indicated that ideally the distribution of the extra value would be fifty-fifty between municipality and the landowner (Respondent 1), or that a part of the value increase should come back to the community (Respondent 11). These views are mainly based on a direct rationale, which assumes that the value increase as a result of the change of the zoning plan partly belongs the community (Muñoz Gielen et al., 2017). On the contrary, the policy makers in the municipalities that work with DOs for (infrastructural) provisions that benefit multiple areas, which are listed in 6.2.5 Bro of the current Dutch legislation and enforceable via public law, all indicated that the value increase belongs to the landowner in principle. Only the costs incurred by the municipality as a result of the effects of the building plans should be paid of the value increase, which is mainly based on an indirect rationale (Muñoz Gielen et al., 2017). This finding seems to illustrate that the type of DOs for off-site costs that municipalities request, seems to be partially related to the personal views of policy makers.

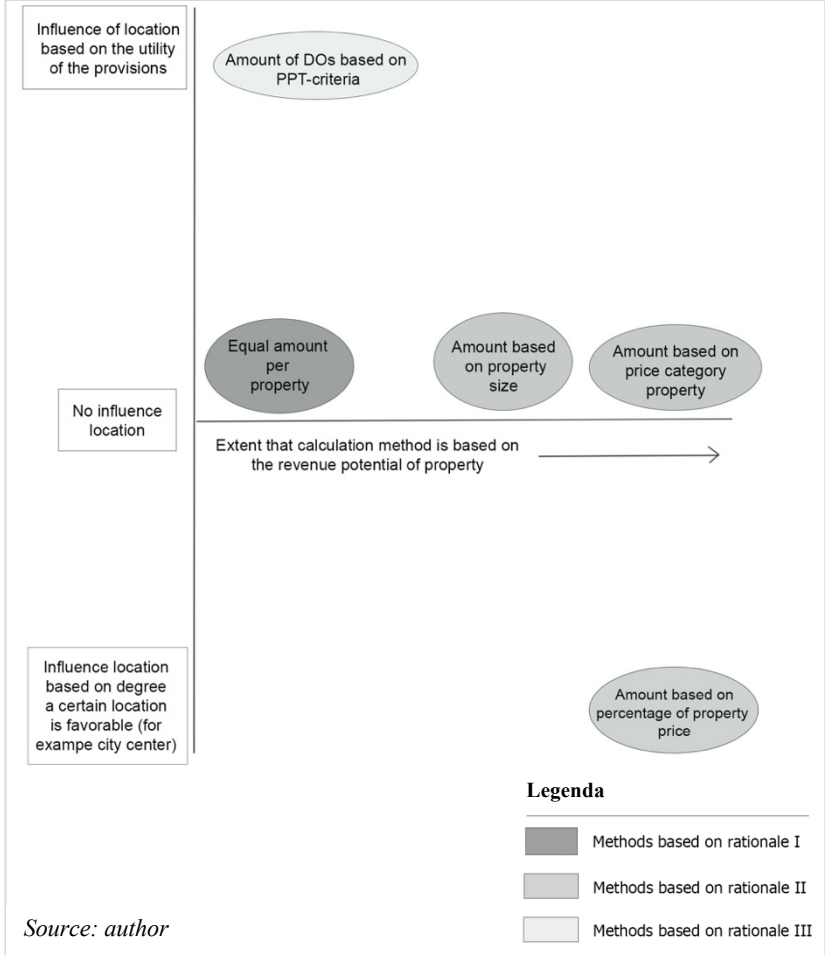
#### *4.2.3 Underlying rationales of different calculation methods: a matter of ethical legitimacy*

The policy documents of the municipal case studies show that the amount of DOs for off-site costs is calculated through a variety of calculation methods. These methods mainly vary in the emphasis given to the distribution keys for differentiating the amount of DOs. Calculation methods used in the case studies vary between an equal amount per property, an amount based on property size, an amount based on the price category of the property, a percentage of the property price and an amount based on the utility of the provisions. Based on the interviews, different rationales can be distinguished for the use of various calculation methods. The first rationale that can be distinguished is the so-called '*equality rationale*' (1), in which the amount and distribution key of DOs for off-site costs is based on the idea that every dwelling should pay the same amount of DOs. Nevertheless, this rationale also has some criticism. Slack (2002) for example states that an equal contribution per property, regardless of where the unit is located, does not reflect the actual costs of a municipality. Therefore this rationale would not lead to efficient development decisions (Slack, 2002). Additionally, the second or '*revenue rationale*' can be distinguished (2). This rationale is based on the idea that the higher the revenue potential of for example dwellings, the higher the DOs paid for off-site costs should be. Two variants can be distinguished within this rationale. First of all, a location-dependent variant can be distinguished, which is influenced by the degree that a location is considered as favorable. An example include the calculation method based on a percentage of the property price. This variant assumes that certain favorable locations, for example in the city center or by the water, can lead to a higher property price than the same property located at a less favorable location. As a result, when applying this method, the dwellings at favorable locations pay more DOs for off-site costs than the same dwellings at other less favorable locations in the city. Additionally, a variant can be distinguished regardless the location within the city.

Examples include an amount based on property size and an amount based on the price category of a property. Nevertheless, one of the respondents critically stated that a larger or more expensive dwelling does not have to lead to more traffic movements or a higher use of public provisions. Finally, a third rationale can be distinguished, the ‘*impact-based rationale*’ (3). This rationale is based on the idea that the amount of DOs for off-site costs should be in proportion to the utility developments have from the provisions that are realized with the DOs (in Dutch this refers to the PPT-criteria).

All these different views underlying the various calculation methods are included in Figure 4.1. In this figure the different calculation methods for calculating the amount of DOs for off-site costs are classified according to the extent that these methods are based on the revenue potential of property (x-axis) and according to the influence of location (y-axis). The figure shows that the location of the property has no influence on the amount of DOs for off-site costs by using the calculation methods: 'equal amount per property', 'amount based on property size' and 'amount based on price category property'. On the contrary, location does matter in determining the amount of DOs for off-site costs by means of the calculation methods 'contribution based on PPT criteria' and 'percentage of property price'. Where in case of the former method the amount of DOs is determined by the location of real estate in relation to the provisions realized, the amount of DOs for off-site costs is indirectly determined by the degree to which a certain location is favorable in case of the latter method, as elaborated earlier in this paragraph. The farther the methods are to the right in the figure, the higher the influence of the revenue potential of property in determining the amount of DOs for off-site costs. By means of this figure different views underlying the various calculation methods for determining the amount of DOs for off-site costs are made clear. It is important to mention that Figure 4.1 is a global representation, a combination of different methods is sometimes also used by municipalities.

Figure 4.1. Different views underlying the use of different calculation methods.



The discussion regarding the different calculation methods also raises questions about what is fair or right regarding DOs for off-site costs. The views of the municipal respondents about what would be fair or right were varied, which highlights the subjectivity and plurality of the ethical dimension of legitimacy, also pointed out by Oosterhout (2001). As respondent 1 illustrates:

*‘Many colleagues now work with the contributions. It has been quite a long and intensive process to agree with everyone on how we are going to do it, especially the calculation method, how are we going to do it, are we going to ask a fixed amount per dwelling or are we going to do an X percentage of the VON price. A great deal of coordination was needed because, yes, many different opinions.’ (R1, municipality A)*

This quote seems to illustrate that the ethical dimension of legitimacy is characterized by different views, making openness to interest mediation important to reconcile these different views on justice and fairness. However, despite all these different views on the justice of various methods, all the planning practitioners interviewed were unequivocally of the opinion that justice starts with an equal policy framework which is applied to everyone who develops in the municipality.

Despite these different rationales and underlying assumptions behind the different calculation methods for calculating the amount of DOs for off-site costs, several planning practitioners interviewed did not know the origin of the amount of DOs for off-site costs or how it was exactly calculated. Respondent 9 for example referred to the fact that the amount of DOs for off-site costs was once set at a few thousand euros per dwelling, after which it has never been revised and always taken over afterwards in new policy. Some other planning practitioners interviewed did have a calculation sheet, but could not explain verbally how the amount of the DOs was determined. As a result, the actuality and explanation of (the establishment of) the amount of DOs for off-site costs can be questioned in some of the municipal case studies.

#### *4.2.4 Municipal flexibility as a characteristic of DOs for off-site costs*

One of the municipal challenges regarding DOs for off-site costs that came forward during the interviews has to do with the contrast between the static character of the policy on DOs for off-site costs and the dynamic character of area development. This contradiction is also mentioned by (Flyvbjerg, 2007). The long planning horizon of certain projects or developments entail great uncertainties. Several planning practitioners interviewed seems to find themselves with a dilemma. On one hand they understand the wish of some developers for more clarity about the expenses, but, at the same time, they do not want to reduce their flexibility. More practically some municipal respondents emphasize that the list of expected expenditure of the DOs for off-site costs applies among other things to the long term, as a result of which there may be uncertainties about the realization of the provisions mentioned within the policy documents. Additionally, almost all municipal respondents indicated that they cannot provide more certainty than laid down in the policy, even if they want. They state that it is often the town council who decides about the expenditure of the DOs for off-site costs, as a result of which they cannot control themselves and cannot make any commitments towards developers. As respondent 19 states:

*‘It is always the town council who decides which provisions will be realized first. That authority has been placed there.’ (R19, expert cost recovery)*

These uncertainties and dependence on the town council seem to provide a relatively high degree of flexibility for municipalities after charging the DOs for off-site costs. At least under the current Dutch Spatial Planning Act (Wro). This municipal flexibility is reflected in the interviews in various ways. For example, almost all planning practitioners interviewed indicate that there is no period of realization linked to the provisions for which the DOs for off-site costs are requested and that there is often no forecast of the expected income through DOs for off-site costs. Respondent 4, developer in municipality B, indicates that even in cases where parking is ‘bought off’ by DOs for off-site costs, the municipality is not able to designate any places where the additional parking spaces might be realized. As a result of this flexibility, some developers interviewed indicated that it often remains to be seen whether the municipality actually makes the investments in the public space as prepared in advance. These concerns correspond to the ones of Ennis (1996). This large degree of municipal flexibility is also illustrated by respondent 9:

*‘Everything that gives us obligations is not standard included in the private law agreement.’ (R9, municipality D)*

As a result of the large degree of municipal flexibility mentioned in the previous alinea, it seems that DOs for off-site costs have some characteristics of a betterment or a development gains tax in some of the case studies. The interviews namely suggest that in advance little certainty can be given about the expenses for which the DOs are used, as a result of which the link between the paying developments and the expenditure cannot be established with certainty either. Although it is understandable that the policy framework for off-site costs concerns a certain amount of assumptions due to the dynamics of area development, this should not be at the expense of the explanation about the current expectations and assumptions and how these could possibly change under certain circumstances.

A possible solution for dealing with these uncertainties as a municipality has to do with only charging the full amount of costs for provisions that are certain yet. For example, municipality C makes a distinction between provisions that are certain and provisions that are not. The costs for the provisions that will be realized for sure are included for 100 percent when calculating the amount of DOs for off-site costs, while the costs of the provisions that are not fully certain yet are only charged for 50 percent.

### **4.3 The formal dimensions of legitimacy: legal and political legitimacy**

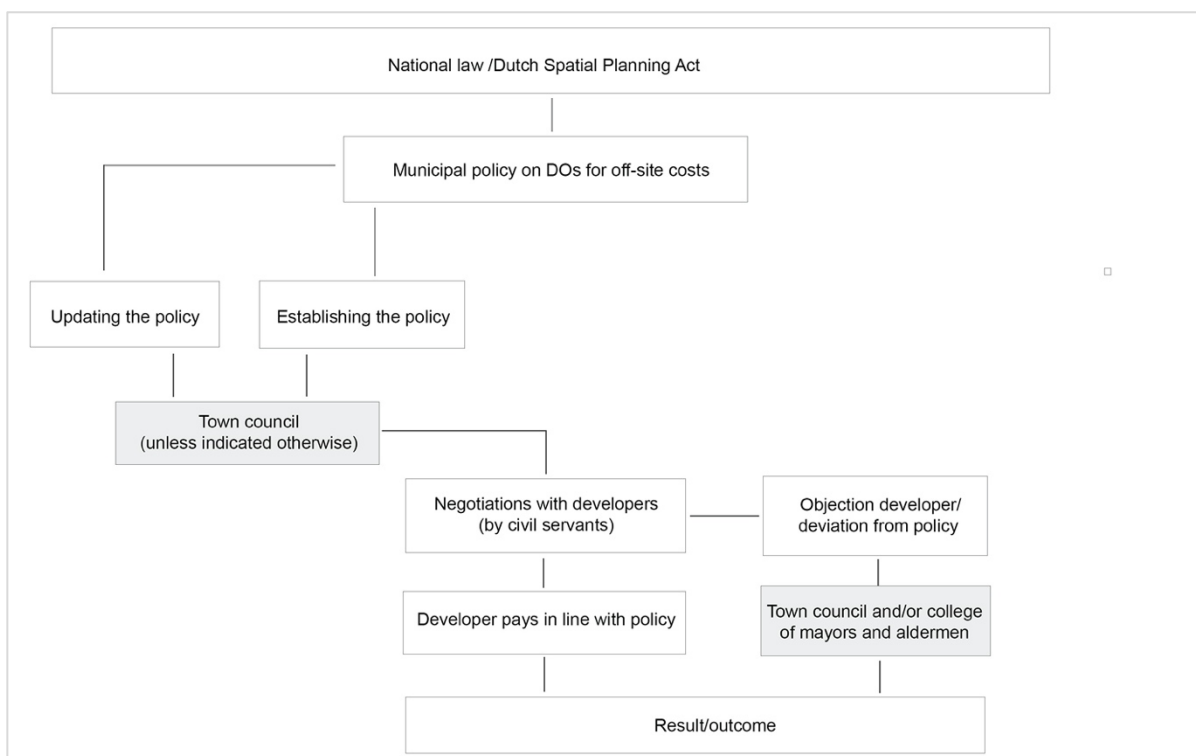
#### *4.3.1 Emphasis on political legitimacy*

As followed from the theoretical framework, it is often held that the establishment of electoral democracy is key for the creation of political legitimacy (Stolk et al., 2018). In the Netherlands municipal elections take place every four years, in which the residents of the municipality elect the composition of the town council. In addition, the college of mayors and aldermen is formed in the negotiations after the elections and aldermen are appointed by the town council. The planning practitioners of the five case studies all describe the major role of politics regarding DOs for off-site costs. Many municipal respondents indicate that the town council not only decides on the establishment of the policy regarding DOs for off-site costs, but also on updates of the policy. In most of the case studies, the town council also decides on any deviations from the policy. This major role of politics in determining, updating and sometimes even in deviation from the policy is shown in Figure 4.2. This figure shows that there is in general little space for civil servants to do something regarding DOs for off-site costs without the intervention or permission of the town council. As respondent 2 states:

*‘We will not cancel the contribution for off-site costs if a development is not financially feasible, that is not even possible, because it is just a council framework.’ (R2, municipality B).*

Overall, political legitimacy thus seems to morally justify the actions of the town council in the case studies, such that the claims and wishes of this authority become moral obligations for the civil servants within the municipality. The town council in the municipal case studies thus appears to have both political legitimacy and political authority, as explained by Buchanan (2002). As a result, planning decisions concerning DOs for off-site costs in the case studies seem to be rather political than based on the planning profession.

Figure 4.2. The major role of politics in establishing, changing and deviating from policy on DOs for off-site costs



Source: author

Several planning practitioners and developers interviewed indicate that despite the fact that the town council is democratically elected, they do not always declare the council's decisions as legitimate. Respondents 8 and 15 for example indicate that political decisions about DOs for off-site costs often lead to uncertainty and delays, comparing it with a balance that can go either way. Additionally several respondents indicate that they notice a lack of relevant knowledge at the town council, as a result of which decisions on the subject are sometimes guided more emotionally than rationally. Respondent 11 indicates for example that the town council in municipality D often sees the DOs for off-site costs as extra income for the municipality, which they often do not want to give up in cases a development is not financially feasible. Despite different advice from the civil servants in the municipality, the town council continues to hold on to this according to the respondent. This is evident from the experiences of respondent 12 as well, developer in municipality D. This respondent indicates that civil servants in municipality D had previously made some commitments based on the policy regarding DOs off-site costs, which they withdrew some time later after political consultation.

As a result, these findings seem to illustrate that political legitimacy does not automatically lead to effectiveness, which is in line with the research findings of Hellström (1997) and Kant (1999).

In the interviews several ways occurred to increase the effectiveness of politics regarding the subject. First of all, several planning practitioners indicated that the town council must listen to the professional judgments of planning practitioners in the municipality and follow this advice. Additionally, the emphasis on political legitimacy regarding DOs for off-site costs can be reduced by the inclusion of clear policy frameworks within which it is possible to deviate from the policy. Examples include when it can be demonstrated that developments are not financially feasible. As a result it is no longer necessary to go to the town council for these cases. Additionally, respondent 8 indicates that a dialogue with the involved market parties can help politicians as well to make decisions in specific cases, to gain more insight into the practice in this way and thereby helps them making decisions that are better aligned with the practice.

The interviews thus seem to show the tension between politics and professional judgements of planning practitioners that can occur regarding the subject, which is also described by Campbell et al. (2000). As respondent 11 shows:

*‘The municipal politics are not really into the subject, which makes it very difficult because they just see the contribution as a little extra income for the municipality. So yes it also depends (..) on how the town council is informed (..) Sometimes we suddenly get documents of them and then we think okay if we all have to ask this to developers, fine, but just know that it won’t work out.’ (R11, municipality D)*

#### *4.3.2 The confused and unclear nature of legislative frameworks*

Another important aspect of the legitimacy of DOs for off-site costs, as followed from the theoretical framework, is the legal dimension of legitimacy. Although authority should be exercised in accordance with law and rules, several respondents pointed at a confused nature of the legislative frameworks under the current Dutch Spatial Planning Act (Wro). They describe that it is often unclear how the legislator intended some DOs for off-site costs or what the legal scope of these DOs is when deployed. As a consequence, some municipal respondents indicate that there are some uncertainties about the legality of the DOs for off-site costs they ask. These concerns are mainly related to the coherence between the paying developments and the provisions realized, also because of outdated visions documents, and to uncertainties about the scope of DOs that can be recovered under private law. As respondent 13 indicates, the current Dutch spatial planning act seems to be interpretable in different ways:

*‘There are of course legal uncertainties. But it is also just how pure you interpret and apply the law legally.’ (R13, municipality E)*

Respondent 1 also points at the unclear legal framework, by emphasizing that working with DOs for off-site costs sometimes also depend on the willingness of a municipality to take a small risk. Examples of expenses of which the legality can be questioned include a bats vantage point, the renovation of certain neighborhoods, picnic areas and environmental education according to respondent 19. Voluntary contributions to spatial developments are intended for public green, blue and gray infrastructure in cities, but not for red developments such as buildings. A possible explanation of this proliferation of various types of costs recovered in private law agreements is also given by this respondent:

*‘DOs for spatial developments are, from what I have learned from the studies I did on the subject, so broad. (..) A lot is being claimed under the contribution of spatial development, just because it is totally not clear what it exactly is.’ (R19, expert cost recovery)*

Table 4.1 has been drawn up on the basis of the interviews and on the basis of an analysis of the legislation under the current Dutch spatial planning act. The table provides an overview of different types of DOs for off-site costs in the Dutch planning practice, together with the legal basis of these contributions, a description, the formal requirements and whether these DOs are enforceable under public law. What is particularly striking about the table, is that for all three forms no clear description is included in the legislation or in its explanation. Sometimes only a few examples are mentioned, for example with ‘voluntary contributions to spatial developments’ (Table 4.1). In the case studies this even led to new terms, such as ‘*bovenwijkse verevening*’ and ‘*bovenplanse voorzieningen*’, instead of ‘*bovenwijkse voorzieningen*’ and ‘*bovenplanse kosten*’. Although ‘clarity’ seems to be a precondition for legitimate rules (Fuller, 1969, Franck, 1990; Byers, 1999 & Finnemore & Toope, 2001), this does not seem to apply entirely to DOs for off-site costs under current Dutch legislation.

Table 4.1. Legal requirements and description of DOs for off-site costs under the Wro/Bro

	<b>Infrastructural provisions that benefit multiple areas</b> ( <i>‘bovenwijkse voorziening’</i> )	<b>Voluntary contributions to spatial developments</b> ( <i>‘bijdragen ruimtelijke ontwikkeling’</i> )	<b>Equalization</b> ( <i>‘bovenplanse kosten’</i> )
<b>Legal basis</b>	Article 6.2.5 Bro	Article 6.24 paragraph 1 a Wro	Article 6.13 paragraph 7 Wro
<b>Description</b>	No definition of ‘bovenwijkse’. Only an exhaustive list of the provisions in article 6.2.5 Bro.	No definition, a description in the explanation of the law proposal and parliamentary treatment: socially important functions such as infrastructure, nature, water storage and cultural facilities.	No definition, only an explanation of a motion from the House of Representatives: equalization between exploitation of areas.
<b>Formal requirement</b>	None. Description coherence between provision and area is obvious.	Vision document: description coherence	Vision document: description of any functional or spatial consistency.
<b>Enforceable under public law</b>	Yes	No	Yes

Source: author, based on the interviews, partly based on Hoekstra (2019)

Despite the fact that the Dutch planning practice traditionally values legal certainty over flexibility (see Booth, 1996; Newman & Thornley, 1996 and Buitelaar & Sorel, 2010), the ambiguities and different interpretative options regarding DOs for off-site costs in private law agreements seem to create more space for flexibility and multiple interpretations by local authorities. This flexibility is enhanced by location-specific policies according to several respondents, giving room to decentralized decision-making and a variety of interpretations of the law, reducing the legal certainty of the law as well (Buitelaar & Sorel, 2010).

Although case law should provide more clarity, multiple respondents indicate that case law on the subject is limited. One frequently mentioned clarifying case is the one of Oldebroek on the 28<sup>th</sup> of August 2019. This case law demonstrated that equalization is actually permitted at the level of a municipality, as long as there is some form of coherence, which may be a somewhat further connection. The interviews revealed various reasons for the limited amount of case law on the subject. Respondent 4 and respondent 21 referred to the time and costs involved and the potential deterioration of the ties with the municipality as a result of starting a lawsuit. Additionally, respondent 21 points at the often weak legal position for developers in such lawsuits. First it must be proven that the developer had to sign the agreement to continue the development in question: from a legal point of view not a favorable position. In addition, reading the Dutch Spatial Planning Act (Wro) carefully, there seems to be a high degree of flexibility for municipalities regarding DOs for off-site costs. An example includes Article 6.13 Wro paragraph 7, in which it is stated that the vision document of the municipality gives indications about the expenditure that *can* be funded from the contribution for equalization. The word ‘can’ refers to a reasonable degree of flexibility for municipalities. This flexibility with regard to expenditure was also expressed in several interviews. As respondent 1 describes:

*‘We don't give that guarantee. Because we cannot guarantee what the DOs for off-site costs will be spent on, we will not include it in the agreement either.’* (R1, municipality A)

This flexibility is also reflected in Article 6.24 paragraph 1a of the Wro, in which it is stated that voluntary contributions to spatial developments based on a vision document may be included when entering into a private law agreement. How the contribution should be anchored in the vision document does not follow from this article. Respondent 21 confirms that only the basis of the contributions must be included in the vision document. This results in vague and often outdated descriptions of the expenses in Dutch vision documents according to several developers interviewed, from which the spending is often not clear and the connection with certain developments in a municipality is missing. As a result, it is even possible to question whether the vision document is the right document to describe the expenses of DOs for off-site costs, since there is no legal process open to it.

Additionally to the criterion ‘clarity’ for legitimate laws, as described in the previous alinea, several respondents indicate that they have doubts about the other criteria that determine the legitimacy of laws as well. A few respondents refer to the familiarity with the law in an indirect manner. They argue that the findability of the elaboration and interpretation of the law is not always easy, referring to the legal history that often offers more clarity. Several respondents also indicate that they are just used to current legislation, especially now more clarity came since the case law of Oldebroek last year. Nevertheless, the new EPA is already expected to enter into force next year (2021). These frequent changes can question the legitimacy of the legislation as well according to Fuller (1969). As respondent 19 also indicates:

*‘Everyone is finally used to the Wro and they finally know how it works or how it could work, and now we are already switching to the EPA’ (R19, expert cost recovery)*

Overall this paragraph shows that although several authors argue that too detailed, inflexible and restrictive legislation can undermine the legitimacy of the legislation (see Bokhorst 2014), too many emphasis on flexibility and unclear or undefined laws seems to undermine the legitimacy of laws as well.

#### **4.4 The (un)acceptance of DOs for off-site costs by developers**

##### *4.4.1 The stratification of the social dimension of legitimacy*

Another vitally important aspect of the legitimacy of DOs for off-site costs is how they are perceived by market parties in the development industry, especially now that municipalities use these DOs not just anymore for provisions strictly related to the developments in question. Although it is advocated in a number of previous scientific studies that the practice of meeting wider community needs and the practice of mitigating the adverse impacts of developments should be strictly separated (see Healey, 1995, Corkindale, 2004; Rowley et al., 2007), from the interviews with developers it appears that often it is not the spending of the contributions, but the amount of the DOs for off-site costs that determines the acceptance of these obligations in the first place. As respondent 16 states:

*‘The most important factor of whether or not we accept DOs for off-site costs and whether we are going to develop is financial feasibility.’ (R16, developer)*

The developers interviewed were unequivocally of the opinion that the willingness to pay the DOs for off-site costs is primarily a commercial consideration, instead of a concern about how and where the money is spent. Several developers even said that they have little interest in the various utilities, provisions and infrastructure that will be realized with the charged DOs for off-site costs, arguing that that is a responsibility for the municipality. A possible explanation for this low level of interest is given in the research of Healey et al. (1996) and Crow (1998), which shows that many developers rather pay the contribution cheerfully, although they may not entirely agree. In this way project delays can be prevented, which is also mentioned by respondent 18. Respondent 15 argued that the alternatives, the public law variant or a lawsuit, are often not more favorable for a developer. The public law route takes extra time and therefore more money in general, as well as a lawsuit. Additionally, since developers are often dependent on the municipality for changing the zoning plan, developers can sometimes better accept the DOs for off-site costs according to respondents 4 and 8. Lastly, several developers point at their relations with the municipality. They indicate that they would rather not risk to undermine their relationship with the municipality when there is enough financial margin in a development to pay the DOs for off-site costs. For the majority of those interviewed this was different when the DOs undermine the viability of their developments or when the contribution local planning authorities ask is much higher than the developer expected based on experience numbers.

Although most developers interviewed indicate that there is often enough financial margin to pay the DOs for off-site costs without problems, from the high amount of criticism it can be deduced that the actual acceptance of DOs for off-site costs by developers goes further than just the amount of DOs. Most of the developers interviewed stated that they are particularly familiar with amounts of around 3.000, 4.000 or 5.000 euros per dwelling for off-site costs.

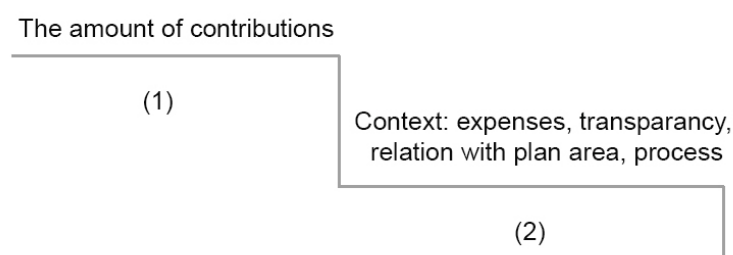
Nevertheless, it appears from the interviews that even when the DOs can be paid easily from the business case, the DOs should still be used in a legitimate way according to several respondents. Various factors emerged in the interviews that seem to influence the acceptance of DOs for off-site costs by some developers as well, among which the various utilities, provisions and infrastructure that will be realized, the relation of these expenses with the paying developments, transparency of the municipal policy, the course of the process, the degree of openness to interest mediation and the moment of payment.

The interviews thus seem to suggest that there is a certain stratification in the social dimension of legitimacy of DOs for off-site costs. First of all, the acceptance of DOs for off-site costs by developers seems to be determined on the basis of the amount of these obligations. When this amount is not in line with previous experiences or when it is financially difficult to fit the DOs into the business case, contextual factors regarding the DOs for off-site costs seem to become increasingly important. As respondent 15 illustrates:

*‘As long as the contribution for off-site costs fits in the financial picture, we will accept it. But if it does not fit the financial picture of the development, then we will be more inclined to say why we should contribute.’ (R15, developer)*

This stratification of the social dimension of legitimacy, whereby the acceptance of DOs for off-site costs seems to be primarily determined by the amount of obligations, is shown in Figure 4.3.

Figure 4.3. A layered approach to the factors determining social legitimacy of DOs for off-site costs



Source: author

These findings about the acceptance of DOs for off-site costs by developers have similarities with the research of Noyon (2017) and Krajewski (2001), in which they state that legitimacy is a hybrid form that is formed by both the empirical and the normative approach of legitimacy. The acceptance of the DOs for off-site costs by developers namely seems to be based both at previous experiences, as on normative legitimacy criteria such as openness to interest mediation, transparency, elaboration, comprehensibility and added value. The statement of Suddaby et al. (2017), that perceptions of legitimacy seem to be influenced by reference scales and previous experiences of those involved, also seems to be validated in this research.

#### 4.4.2 Criticism of developers at DOs for off-site costs

For the majority of the developers interviewed it is an acceptable principle that developers should contribute to off-site provisions within municipalities, especially when these provisions are needed to support their development or make their development acceptable in planning terms. The idea of asking DOs for off-site costs thus seems to be legitimized among developers. A critical note on this acceptance, is made by respondent 4:

*'I suppose the basic idea must be the same everywhere. Municipalities ask for a contribution, the city is growing, we have to invest, so we have to ask a contribution for each project.'* (R4, developer within municipality B)

Despite the fact that the majority of the developers interviewed consider the idea of asking DOs for off-site costs as legitimate, from the interviews it appears that there is especially a reasonable amount of criticism on DOs for off-site costs in the field of municipal implementation and elaboration. Multiple developers interviewed describe the lack of transparency and accountability as a hallmark of the system in the Netherlands, making DOs for off-site costs a 'black box' or 'grey area' with little insight for those to whom the policy applies. For the majority of those interviewed, concern centred especially on planning departments lacking the knowledge to explain the DOs for off-site costs, together with lacking the capacity to understand development viability, negotiate effectively and to make developer obligations policies transparent and accountable. The developers interviewed were unequivocally of the opinion that it is often not clear what is being paid for and where the DOs for off-site costs can be spent on. In addition, several developers argued that there is often a disconnection between the DOs and the site of delivery, or this is unknown because some municipalities already have difficulties specifying the provisions or infrastructure where developers are contributing to. This is emphasized by respondent 18. He notices that the civil servants who conduct the negotiations for concluding a private law agreement are often not completely aware of the underlying thoughts behind the policy on DOs for off-site costs, making it difficult to justify the policy towards the developers. This is also in line with the findings described in paragraph 4.2, in which it appears that several planning practitioners did not know how the amount of contributions was determined, or had difficulties mentioning the provisions for which the DOs were requested. Some planning practitioners interviewed also referred to other colleagues who drafted the policy, while they are involved in the negotiations with developers themselves. This intransparency is, among others, mentioned by respondent 8:

*'I don't want to say that there is anything unjust about contributions for off-costs costs, but it is not really transparent what you actually pay for and who benefits, it is all very unclear.'* (R8, developer within Municipality C)

The majority of the developers interviewed indicate that they have more difficulties with DOs for matters of general interest than when the contribution is meant for provisions such as infrastructure, greenery and water to make their development acceptable in planning terms. As a result, recovering on-site costs seems to provoke much less discussion about the legitimacy of recovering these costs than in the case of DOs for off-site costs. This is also reflected in the research of Crook & Whitehead (2002), in which it is stated that the developers' willingness to pay decreases as the link with their project becomes less clear. Based on this, the social dimension of legitimacy is likely to lose momentum when DOs for off-site costs from a higher category are requested (see Table 2.2 at page 31-32). Making the application of PPT-criteria mandatory in private law agreements thus seems to contribute to the acceptance of DOs for off-site costs by developers. Nevertheless, this will probably not go without discussion in the Dutch planning context, partly due to the administrative burden that this will entail for municipalities.

#### *4.4.3 Input, throughput, output and implementation legitimacy*

After paying the DOs for off-site costs, the majority of the national developers interviewed indicated that they are no longer concerned with the expenses of the paid DOs for off-site

costs. Arguments put forward include limited time, other projects and the administrative burden that checking the expenditures of municipalities entails. On the contrary, several developers interviewed indicated that they do expect to see something in return in the vicinity of their development, especially some local developers. As also stated by respondent 7:

*‘A project developer makes a contribution and often expects to see something in return.’ (R7, municipality C)*

Nevertheless, the interviews seem to show that the output of the negotiations does not always have to be in line with the actual implementation of these provisions, since municipalities can make little or no commitment about the expenses. As respondent 15 states:

*‘We occasionally come across DOs for off-site costs of which we really do not know what happens to them in the end. And we don't find out either (.)’ (R15, developer)*

Regarding the systemic theorization of input, throughput and output legitimacy (Schmidt, 2013), a general theory about the compliance of the policy of municipalities and the agreements made seems to be missing, which can be referred to as the *‘implementation legitimacy’* (Figure 4.4). *‘Implementation legitimacy’* concentrates on what goes after reaching agreement about the output, which has been left blank by previous system theories of Scharpf (1970) in Bokhorst (2014), Scharpf (1999) and Schmidt (2013). In contrast to input, throughput and output legitimacy, implementation legitimacy focuses on the compliance of agreements made, the documentation and accountability of certain acts after agreement has been reached. The quality and degree of compliance of the agreements made among developers and local authorities can namely influence the social legitimacy.

Figure 4.4. Input, throughput, output and implementation legitimacy



Source: author

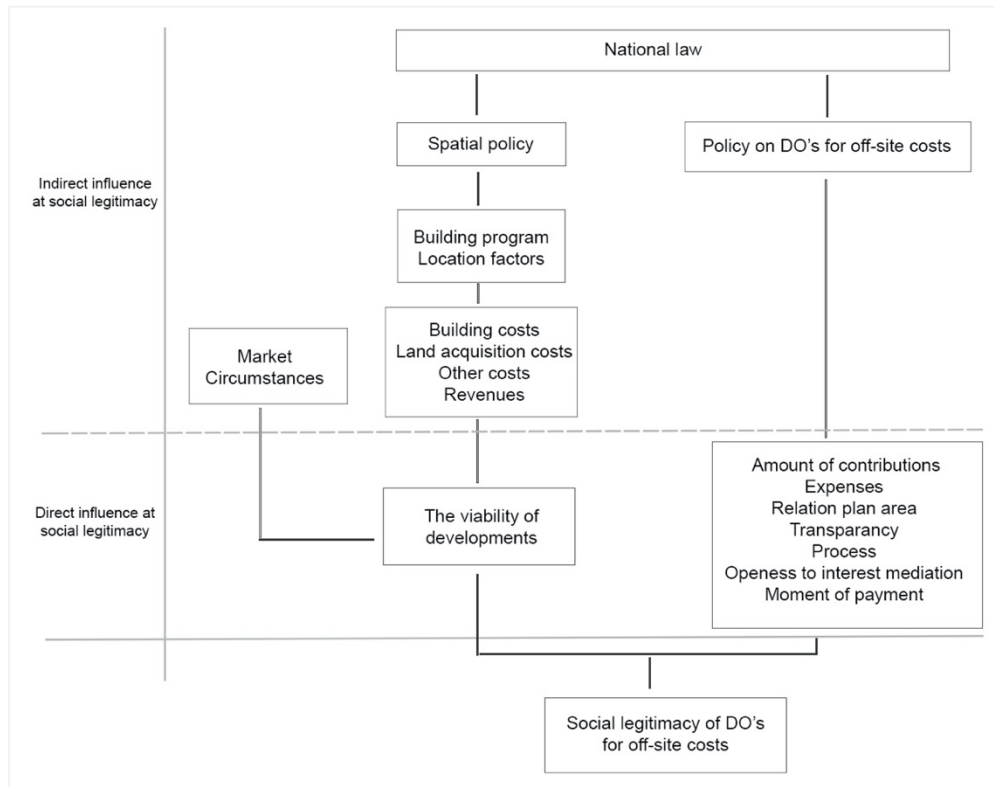
Especially local developers indicated that they consider DOs for off-site costs as more legitimate when they see that the municipality realize certain provisions as stated in their policy and as explained during the negotiations. A possible explanation for this has been given by respondents 4 and 12. Both local developers indicate that they, or most of their employees, live in the municipality themselves, as a result of which they also benefit from the provisions. Additionally, they argue that they are regularly addressed by residents on their projects in the city, which gives them an extra interest in creating a worth mentioning project.

#### 4.4.4 The acceptance of DOs for off-site costs is location dependent

As mentioned earlier, it follows from the interviews that the viability of developments is partly decisive for the acceptance of DOs for off-site costs by developers. Several respondents emphasized that this makes the acceptance of DOs for off-site costs very context dependent. It follows from the interviews that many factors can influence the viability of developments, thereby indirectly influencing the social dimension of legitimacy. These indirect factors are, for example, the market circumstances, the building program and locational factors. From the interviews it emerged that these factors can influence among others the building costs of a development, the land acquisition costs and the revenues of a development. Respondent 18

even argues that non-financially factors such as the building program often have much more influence on the viability of a development than financial requirements such as DOs for off-site costs. These findings seem to suggest that factors as market conditions, building program and building costs seem to influence the social dimension of legitimacy of DOs for off-site costs in an indirect manner. An overview of the direct and indirect factors that seem to influence the social dimension of the legitimacy of DOs for off-site costs is included in Figure 4.5. A possible relationship between the size of the municipality and the acceptance of DOs for off-site costs, as expected beforehand, did not emerge in the interviews.

Figure 4.5. Factors influencing the social dimension of legitimacy regarding DOs for off-site costs



Source: author

The factors shown in Figure 4.5 appear to emphasize the heterogeneous nature of the real estate market, as a result of which legitimacy can be experienced differently by different actors or in different contexts (Oosterhout, 2001). Nevertheless, from the interviews it seems to appear that the municipalities with a higher potential yield of future developments seem to have less discussion with developers about the DOs for off-site costs in general. Additionally, respondent 9 indicates that he notices in the municipality itself that the higher the pressure on the housing market in the villages within the municipality, the easier the DOs for off-site costs are received. As respondent 9 indicates:

*'In (name village) you have much more discussion about getting a development feasible, so there is also more discussion about the DOs for off-site costs by a contribution to the spatial quality fund. While you see in (name village) if the housing market is good, developers are standing in the row to develop. When someone does not want to development then we just say okay, then we call someone else, which makes it much easier for us to receive the requested DOs for off-site costs. That is the difference.'* (R9, municipality D).

This finding seems to be in line with the research of Crook and Monk (2011). Within this research it is stated that the scarcity of housing leads to more planning gain available for paying DOs for off-site costs. Nevertheless, a critical remark must be made. Several respondents indicated that the statement ‘scarcity of housing leads to more planning gain available’ cannot be viewed separately from the context of area development. They indicate that the viability of developments and the financial space to pay the DOs for off-site costs is highly contextual and depends on many factors, as also shown in Figure 4.5. Examples include the rising construction costs in the Netherlands and the ever-increasing ambitions of some municipalities, which can put financial margins of area developments under pressure. In addition, in the case of inner-city area developments the difference between the value of a site arising from new developments and its value in its existing use is in general less than changing agricultural land into land for housing. As a consequence, the scarcity of housing does not automatically lead to more planning gain available for paying DOs for off-site costs. As respondent 6 states:

*‘The construction costs have risen last year and perhaps even more than the prices of the houses or commercial real estate, which can make it more difficult to pay the DOs for off-site costs’ (R6, municipality C)*

#### **4.5 The static character of the ‘negotiation’ process**

##### *4.5.1 Voluntary almost never occurs*

From the interviews it emerges that under the current Dutch Spatial Planning Act (Wro), the existing basis for ‘voluntary contributions’ under Article 6.24 paragraph 1 (under a) is often misused. Although DOs for off-site costs are meant to be negotiated between developers and municipalities under private law, almost all developers interviewed indicated that there is usually no negotiation possible about the DOs for off-site costs. According to respondent 10, Dutch municipalities often present DOs, that can only be recovered in private law agreements, as mandatory contributions. This limited degree of negotiation possibilities is indicated by both some planning practitioners and developers interviewed:

*‘Although it is not even enforceable under public law, it was not possible to negotiate much about that DOs to spatial quality within the municipality, although we tried of course’ (R12, developer in municipality D)*

*‘There is no negotiation possible about the DOs for off-site costs that we request. If you start with that there will be no end’ (R5, municipality C)*

As a result, planning permission often seems to be linked to the requested DOs for off-site costs when concluding private law agreements. This finding seems to illustrate the same shift as Campbell et al. (2000) already described two decades ago in Britain. A process that was long believed to be justified and legitimized by the ability to assess the suitability of development on non-financial grounds, namely a good spatial planning, seems to be no longer separated from financial grounds in some Dutch municipalities. These financial grounds refer to the payment of the DOs for off-site costs. Nevertheless, the legality of this can be questioned according to Hoekstra (2019) and respondent 21:

*‘If a municipality thinks that a development is in line with a good spatial planning, DOs for off-site costs cannot be enforced in the private law contract, that would namely*

*be contrary to the idea that something will take place on the basis of consensus, so that is not possible.’ (R21, lawyer area development)*

As a consequence of this static character of the ‘negotiation’ process for concluding private law agreements, it seems that the degree of throughput legitimacy can be questioned within some of the municipal case studies. As the theoretical framework showed, throughput legitimacy is namely formed by, among other things, openness to interest mediation (Stolk et al., 2018 & Schmidt, 2013). Despite, many of the developers interviewed indicate that most of the time municipalities see DOs for off-site costs as a fill-in exercise, where the DOs are already copy-paste included in the (concept) private law agreement. As a consequence of the absence of negotiation possibilities in some cases, several developers indicated that they regularly feel that they have to sign the agreement in order for their project to continue. As respondent 12 indicated:

*‘We got the concept agreement in September and responded two days later. We then heard nothing for five weeks. Then finally we got a reaction to our reaction, that everything has been rejected (..) and that we must sign the agreement, because on Thursday evening the college of mayors and aldermen will be there and then the agreement must be there. Then you are already standing with your back to the wall and then as a market party you choose the road with the least resistance, because you just want to continue.’ (R12, developer within municipality D)*

Nevertheless, during the interviews some examples were also mentioned of cases where it was possible to negotiate about the amount of DOs for off-site costs to a certain extent. Respondent 8 indicated for example that municipalities are sometimes willing to lower the level of DOs for off-site costs when they realise that a contribution cannot be made financially out of the business case. However, not every municipality seems to have clear and unambiguous frameworks within which the DOs for off-site costs can be negotiated. As respondent 1 indicated:

*‘When a development is not really important to us, we will charge the full 100 percent of the contribution to spatial developments. But when we see added value of a development to the municipality, (..), we possibly lower the contribution.’ (R1, municipality A)*

It is striking that in the interviews it did not come forward that developers are negotiating other matters such as a building program, in exchange for paying the DOs for off-site costs.

#### *4.4.2 Mutual (in) transparency and limited accountability*

Two other features of the negotiation processes regarding DOs for off-site costs that emerged in almost all interviews with developers, are in general a limited degree of accountability of the DOs for off-site costs and a limited extent to gain insight into each other's interests during the negotiations. A few developers referred to some exceptional cases, where it was financially impossible to include the DOs for off-site costs into the business case of the developments. These developers indicated that most of the time the municipalities in question had little regard for their calculations and the economic feasibility of the development, often referring to the ‘high amount of financial resources developers have’ or because of a distrust towards the data provided. Respondent 1 of municipality A also highlights this intransparency:

*'We will never completely find out whether the financial feasibility of developments will come under pressure as a result of the DOs for off-site costs, because project developers always come up with arguments that highlights the inability to pay these obligations we ask for spatial developments. Of course, you never know to what extent that is true. You never know how the other party exactly calculated the exploitation. (...) We did not deviate and what we have seen in practice, is that these developments will continue as usual, despite the DOs for off-site costs'* (R1, municipality A)

This quote seems to illustrate that municipalities sometimes rather insist that deviating from the contribution is not possible, instead of delving into the interests of the other by negotiating. Respondent 8 highlights the importance of providing insight into the viability of a development when there is a tension between the DOs for off-site costs and the development in question, by indicating that without understanding each other's interests and concerns, having a substantive discussion and negotiation almost become impossible. Solutions that have been suggested for reducing distrust regarding the data and calculations made by developers include contacting a consultancy firm to prepare an independent calculation, or by making a calculation as a municipality based on the fiction that the municipality would be the landowner. As respondent 20 indicates, developers can also work on the understanding of municipalities by being as transparent as possible about their business case during the negotiations. These findings show that increasing the transparency and accountability of the process, which can increase the throughput legitimacy (Stolk et al., 2018 & Schmidt, 2013), requires mutual effort of both developers and municipalities.

Lastly, although some planning practitioners interviewed indicate that they sometimes justify and explain the DOs for off-site costs during the negotiations for concluding a private law agreement, some developers interviewed indicate that this accountability is usually limited. They indicate that they must often ask for a justification of the DOs themselves. On the contrary, several planning practitioners indicate that developers often do not explicitly ask for it, or just ask about the precise application of the policy to their development.

#### **4.6 Effects and consequences of DOs for off-site costs**

Some (possible) effects and consequences of working with DOs for off-site costs emerged in the interviews. Most of the time, reference was made to the possible effects of DOs for off-site costs on the purchase and rental prices of real estate. Almost all developers interviewed indicated that they include the DOs for off-site costs in the set-up costs of a development, thereby influencing the purchase or rental prices. As a result, several respondents concluded that buyers and tenants are the actual payers of DOs for off-site costs. As respondent 15 indicates:

*'If a municipality demands a very high above-average payment, or a very low one, the consumer ultimately pays it in the VON price of the home.'* (R15, developer).

This finding, that DOs for off-site costs would lead to increased purchase or rental prices of dwellings, is in line with previous research of Campbell et al. (2000). The opposite view, that housing prices are mainly a result of supply and demand (Tsai, 2012), was surprisingly not mentioned during the interviews. Only a critical remark was made by respondent 15. This respondent indicated that consumers in the today's market, which is characterized by a high demand for housing in the Netherlands, are often prepared to pay 100 percent of the housing prices asked. As a result of this willingness to pay 100 percent of the price, there are in general enough revenues to pay the DOs according to this respondent. Nevertheless, the respondent

indicates that there are also periods that consumers are no longer willing to pay the full 100 percent of the prices asked, as a result of which the prices of the real estate have to be lowered to get them sold. This thought seems to illustrate that housing prices are determined by demand and supply in the first place, which in turn influences whether the DOs for off-site costs can be paid from these revenues in relation to the costs involved. Perhaps this makes it seem as if the consumer is paying the DOs for off-site costs, while the real estate prices are still primarily determined by supply and demand.

Another effect that emerged in the interviews has to do with undermining the economic feasibility of developments at locations which are hardly picked up by the market. Although almost all developers interviewed indicated that usually the DOs can financially be included in the business case, a few respondents gave some examples where the DOs undermined the viability of the development. As explained by respondent 12:

*'These days you have to acquire the land expensive, you can also sell real estate for a higher price, that is true. You only take a risk and most of the time margins make the difference between an interesting development or that there is not enough margin to remain.'* (R12, developer within municipality D)

Nevertheless, the viability of developments is determined by many factors, as shown in paragraph 4.4.4. As a result, it depends on many factors whether or not DOs for off-site costs can be financially included in the foundation costs of a development. Respondent 4 adds that in order to develop difficult places within a city that are not picked up by the market, a contribution from the government is often required to develop these kinds of locations.

Lastly, the interviews and policy documents of the case studies seems to show that municipal policy regarding DOs for off-site costs can have unexpected effects. A policy evaluation within municipality E for example, which previously worked with a social housing fund, show that this form of DOs for off-site costs has led to less social housing instead of more. Developers rather pay the contribution than claiming financial means from the fund to realize more social housing than a certain percentage. These unexpected effects seem to illustrate that working with DOs for off-site costs is also a matter of trial-and-error, which was also highlighted by respondent 1.

## **4.7 The future of DOs for off-site costs in the Dutch planning practice**

### *4.7.1 Similarities with the practice of DOs for off-site costs in Britain two decades ago*

What is particularly striking about the interviews is the number of similarities the current Dutch practice regarding DOs for off-site costs seem to have with the situation in Britain about two decades ago, as described by Campbell et al. (2000), Campbell and Henneberry (2005) and Ennis (1996). As followed from the theoretical framework, inconsistency and a lack of transparency were the main shortcomings of DOs for off-site costs in Britain (Campbell & Henneberry, 2005). Additionally, concerns centred on the legality of the DOs for off-site costs (Campbell & Henneberry, 2005), whereby Campbell et al. (2000, p. 767) speaks about a *'confused nature of the legislative and policy frameworks'* in Britain. Besides, Campbell and Henneberry (2005) describe that the policy objectives regarding DOs for off-site costs were often unclear, which also seems to emerge from the Dutch context based on the interviews. Other similarities with the Dutch practice relate to concerns about the implementation of the provisions (Ennis, 1996), a widened use of DOs for off-site costs (Campbell et al., 2000) and blurred relations between a certain development, its impact, and the actions needed to mitigate

the impact. Discussions about whether planners should base their negotiating position on the utility of provisions, the development value or the economic viability of several developments also occurred in Britain (Campbell & Henneberry, 2005). As a result, there seem to be quite a lot of similarities between the current Dutch practice of DOs for off-site costs and the use of DOs for off-site costs in Britain two decades ago.

As described in the theoretical framework, in Britain these problems and shortcomings have led to more regulation through the introduction of the CIL: a non-negotiable planning charge to help deliver infrastructure in areas (Lord, Dunning & Dockerill, 2018). Nevertheless, almost all respondents indicate that they do not consider more regulation, in the sense of standardizing DOs for off-site costs, as desirable for the Dutch planning practice. As explanation several respondents refer to the location dependence of DOs for off-site costs. As respondent 19 explains:

*'Every municipality is different, one municipality is shrinking, the other municipality does not have off-site provisions anymore for which they want to charge DOs for off-site costs and another municipality still has a lot of off-site provisions to be realized. Since the DOs will be determined at for example the national level, it never comes out with that amount. It will be an average for the whole of the Netherlands. One municipality will then get way too much contributions and another municipality will not get enough financial means for its off-site provisions.'* (R19, expert cost recovery)

Other arguments against a standardized approach regarding DOs for off-site costs in the Netherlands refer to the fact that standardized DOs for off-site costs does not reflect the costs actually incurred, also mentioned in the research of Muñoz Gielen (2014) and Lam et al. (2012). As respondent 1 indicates:

*'I think you should always have a link with the size of what an initiative costs and I think that will be difficult with a standardized approach'* (R1, municipality A)

These findings seem to illustrate that there is little support among the respondents of the research for a standardized approach of DOs for off-site costs within the Netherlands. Nevertheless, the many similarities with the situation in Britain two decades ago provide an answer to the question whether the (previous) situation in Britain and their solution sought by means of the CIL are relevant to Dutch planning practice. Given the many similarities, the answer to this seems to be unanimously yes.

#### *4.7.2 The EPA: a broadening of the possibilities regarding DOs for off-site costs*

An important shift that will change the legal playing field of DOs for off-site costs in the Netherlands, is the introduction of the new EPA. This new law is expected to enter into force in 2021 (Rijksoverheid.nl, 2019). From the interviews and analysis of this new legislation in its current form, some worth-mentioning changes emerge regarding DOs for off-site costs in the Netherlands (overheid.nl, 2019e; overheid.nl, 2019f, p.17). Although the interviews seem to show that under the current Dutch Spatial Planning Act (Wro) there is already quite a lot of criticism of developers on DOs for off-site costs that are hardly related to their developments, the possibilities for charging these 'voluntary' DOs for spatial developments are even increased under the EPA (overheid.nl, 2019c, overheid.nl, 2019e). This type of DOs for off-site costs, in Dutch called '*bijdrage ruimtelijke ontwikkeling*', will namely become enforceable under public law under the new legislation (overheid.nl, 2019c, overheid.nl, 2019e, Hendriksma, 2019).

However, the new regulation under the EPA stays largely in line with important principles of section 6.4 of the Wro (Hoekstra, 2019; overheid.nl, 2019e, p. 28). A municipality and a developer can conclude a private law agreement on cost recovery and financial contributions prior to the decision that makes the designated activity possible (overheid.nl, 2019e, p. 28). The new regulation offers a basis for this as well, as a result of which the current practice can be continued under Article 13.13 of the Supplemental Act land ownership, which is part of the EPA (overheid.nl, 2019e, p. 28). The public law route just works as a ‘stick behind the door’ for cases cost recovery is not insured on the basis of a private law agreement. The PPT-criteria only needs to be applied within the public law route (Hoekstra, 2019). So far nothing new.

Not in the bill itself, but via Amendment Ronnes adopted by the House of Representatives in October 2019, a far-reaching successor to the current article 6.24 paragraph 1 under a has appeared, in Dutch: ‘*financiële bijdragen aan ontwikkelingen van een gebied*’ (before: ‘*bijdrage ruimtelijke ontwikkeling*’/‘*contributions to spatial developments*’) (overheid.nl, 2019c, Hendriksma, 2019). The submitters pursue that municipalities should have the legal possibility to recover costs, which are necessary for improving the quality of the physical environment, at the initiator of construction activities. Additionally they argue that competent authorities (municipalities, provinces and water boards) must have the legal option to obtain these contributions under public-law in specific and legal situations (overheid.nl, 2019c). As a result Amendment Ronnes gives Dutch municipalities the opportunity to enforce these DOs for off-site costs regarding spatial developments under public law if necessary (overheid.nl, 2019c, Hendriksma, 2019). The conditions for doing so include a degree of functional coherence with the paying development and the amount of these DOs under public law should not exceed the developer's net revenue or the value increase of the developer accomplished by the municipality, according to Article 13.23 paragraph three (overheid.nl, 2019e, p. 31; (overheid.nl, 2019c; overheid.nl, 2019f).

Despite these limitations, the examples of the spending of the contributions to spatial developments (‘*financiële bijdragen aan ontwikkelingen van een gebied*’) mentioned in Amendment Ronnes can be called at least divergent. Mentioned examples include qualitative improvements in landscape, nature, water or the nitrogen balance, the construction or modification of roads, the construction of a park or recreation area, the realization of social housing outside the plan area if less social housing is realized within the plan area than is deemed desirable by municipal policy, a contribution for demolition of dwellings if this is desirable (for example due to shrinkage) or demolition of outdated stables when new stables are realized elsewhere (overheid.nl, 2019c, p.2). Additionally, in document 35133-number 38 of the House of Representatives it even follows that a contribution may be requested for refurbishing outdated industrial sites if the construction activity consists of the construction of a new industrial site (overheid.nl, 2019d, p. 5-6). The current vision document of municipalities, in which these expenses must be documented, will change into an ‘*Omgevingsvisie*’ und the EPA.

Although this legal change regarding DOs for off-site costs under the EPA seems to strengthen in particular the position of the municipality, respondent 21 emphasizes that the administrative burden for municipalities will also be increased under the EPA. As described in Article 13.23 paragraph 2 (Overheid.nl, 2019c), the contributions should be spent on provisions for which they have been requested. Additionally, this article describes that municipalities periodically have to justify the use of the charged financial contributions to the public (Overheid.nl, 2019c). Nevertheless, it appears from the legislation that these articles only apply under public law.

This new enforceability of contributions to spatial developments seems to confirm the widening scope of DOs for off-site costs in the Netherlands, to achieve quality improvements, to provide community benefits and to support wider policy objectives. The new Supplemental Act land ownership (part of the EPA) now even literally refers to ‘improving the quality of the physical living environment’ (Overheid.nl, 2019c, p.1). According to respondents 20 and 21, the use of DOs for off-site costs is expected to increase as a result of the new regulation. Municipalities are expected to be more certain about the legality of the DOs for off-site costs they request. As respondent 21 indicates:

*‘The effect of the adopted Amendment of Ronnes will be in the first instance that municipalities will probably feel more secure about whether they can request such contributions. Because the answer to that is yes, because if a developer does not want it, a municipality can still include it. So that is an important strengthening of the position of the municipality.’* (R21, lawyer area development)

If this is indeed the case, it seems to be in contrast with the intention of the initiators of this Amendment. As they describe in the explanatory memorandum of the Amendment, authorities should be given the legal option to enforce these contributions under public law only in specific and exceptional situations (overheid.nl, 2019c). Further elaboration of the EPA, in which an exhaustive list of costs that can be recovered as *‘financiële bijdragen aan ontwikkelingen van een gebied’* may be included, will follow.

Overall the political agreement with the Amendment Ronnes not only highlights the close link between the political and legal side of legitimacy, but also shows that input, throughput and output legitimacy criteria can be applied to the legislative process as well. Within a letter of the NEPROM, the interest group for project developers in the Netherlands, send to the Dutch Senate in November 2019 a reasonable amount of criticism has been made regarding the legislative process of the EPA. This criticism mainly includes a messy legislative process (1), little space for dialogue and participation (2) and market input which is not taken seriously (3). As a result, NEPROM indicates that this results in legislation which is opaque and unworkable (NEPROM, 2019). Based on the findings of the NEPROM (2019), legitimacy criteria such as openness for interest mediation, transparency, participation and effectiveness do not seem to apply entirely to the legislative process. As a consequence, the degree of input, throughput and output legitimacy during the legislative process of the Supplemental Land and Property Act seems to be questioned from the view of the NEPROM.

Lastly, it is striking that on the basis of this research hardly any justification has been found for Amendment Ronnes, except that it fits within the political dimension of legitimacy. The research seems to show that the developers' willingness to pay DOs for off-site costs is likely to decrease as the link with their project becomes less clear. Since the Amendment Ronnes in particular refers to qualitative improvements in municipalities, the extent to which the Amendment is in line with the social dimension of legitimacy can seriously be questioned, as well as the necessity of some quality improvements mentioned. The debates that occurred after the adoption of the Amendment also seem to put pressure on the ethical dimension of legitimacy and while the research seem to show that clarity of the laws is important for the legal dimension of legitimacy, new vague terms such as ‘functional cohesion’ are introduced by this Amendment. Regarding the nature of the mentioned examples, among which the refurbishment of existing business parks in cities, the realization of social housing outside the plan area and a contribution for the demolition of dwellings or outdated stables (overheid.nl,

2019c, p.2; overheid.nl, 2019d, p. 5-6), even the delivery of collective and public goods as legitimization of government action can be questioned. These examples do not seem to be public goods, despite the fact that it is generally acknowledged that the delivery of public goods is one of the core tasks of governments (see also Anomaly, 2015; Holcombe, 1997; Moore, 1978). A possible consequence, mentioned by Bokhorst (2014), is that without widely shared views on justice and social acceptance, the formal acceptability of laws and policy can erode over time and the relationship of trust between municipalities and developers can be deteriorated. An open dialogue about the further elaboration of these contributions to spatial developments under the EPA, in which all interests are involved, therefore seems to be inevitable.

#### *4.7.3 Alternatives: who should pay for public provisions?*

Striking is that during the interviews several respondents pointed at an alternative of DOs for off-site costs, which they consider as fairer. This alternative concerns a tax for residents of the municipality to improve quality of public provisions within the municipality. The respondents in question point out that now DOs for off-site costs seem to function more for quality improvement in some municipalities, which is likely to increase under the EPA, they do not consider it as fair anymore that developers pay these DOs. As respondent 20 argues:

*‘It is actually quite unfair that you charge the new developments with something that should actually be paid out of tax money, because it concerns public provisions and improvements that benefits everyone, including the existing residents.’ (R20, jurist)*

This finding seems to emphasize the importance of splitting the costs between the existing city and the new developments in a municipality, especially when DOs for off-site costs are intended to improve the spatial quality or to achieve community and broader policy goals. An example is the policy in municipality C, whereby a distinction is made between the existing city and new developments, by distributing the costs of the planned public provisions. Some other planning practitioners in the municipal case studies also indicated that not only developers contribute to the provisions that are realized with, among other things, the paid DOs for off-site costs. For example, respondent 2 from municipality B indicates that the DOs for off-site costs often represent a small part of the total costs incurred for the realization of certain provisions and that a large part is also paid from the General Resources of the municipality. Nevertheless, not all the case studies in the research showed that the costs of the off-site provisions are split between developers and the existing city.

*‘Very few resources for the provisions realized come from the DOs for off-site costs.’ (R2, municipality B)*

Overall these findings raise the question who should pay for quality improvements in the city: developers via DOs for off-site costs, sometimes combined with financial municipal resources, or the future residents via a tax. This question is particularly in line with the extensive debate among several scholars whether a (betterment) tax would not be a better alternative for DOs for off-site costs: a question to which different answers seem to exist (see also Schep, 2012; Coleman & Grimes, 2010; Fensham & Gleeson, 2003).

## 5. Conclusion

The question how the legitimacy of DOs for off-site costs in private law agreements can be enhanced in the Netherlands is examined in this thesis. In light of answering the first sub-question of the research, related to the factors influencing the legitimacy of DOs for off-site costs in private law agreements, the research reveals the contested and multidimensional character of legitimacy. With an eye to overall coherence, four dimensions of legitimacy can be distinguished: a political, legal, social and ethical dimension. These four dimensions of the concept of legitimacy ensure that multiple normative factors can be distinguished that influence the legitimacy of DOs for off-site costs. While electoral democracy is a precondition for political legitimacy, the legal dimension of legitimacy is mainly determined by factors as the publicity, clarity and the stability of the law and regulations, together with the extent that authority is exercised in accordance with the law. In addition, the research shows that the social dimension of legitimacy is primarily determined by the amount of DOs for off-site costs in relation to reference scales and previous experiences of developers. The statement of Suddaby et al. (2017), that legitimacy is the result of assessments by the involved parties about the correctness of certain measures based on comparative ideas or previous experiences, is thus validated in this thesis. However, the research shows that other factors contribute to the social dimension of legitimacy as well. These factors include among other things the various provisions that will be realized, the relation of these expenses with the paying developments, the transparency and elaboration of municipal policy, the viability of the development in question, openness to interest mediation and municipal accountability of the DOs. Lastly, the research shows that the ethical dimension of legitimacy is highly subjective and contested. Disputes over the reasonableness of arguments can therefore only be solved by a reconciliation of these different views on justice and fairness, whereby openness for interest mediation and accountability are in particular important factors for the ethical dimension of legitimacy.

The research shows that in practice several problems can arise with regard to the legitimacy of DOs for off-site costs in private law agreements, which answers the second sub-question of the research. Several municipal respondents pointed at a lack of clarity of the current Dutch legislation (Wro) regarding DOs for off-site costs, together with a limited degree of case law on the subject. This leads to a proliferation of interpretations of the law at the local level, or sometimes even to uncertainties about the legality of the requested DOs for off-site costs. Several respondents also pointed at the fairly rapid succession of different laws, while they are just used to the current legislation. In addition to these problems, which are part of the legal dimension or legitimacy, it appears that the emphasis seems to be on political legitimacy when legitimizing DOs for off-site costs in the Netherlands. This major role of politics is reflected in the role of the town council by establishing policy on the subject, deciding about policy updates and in some of the case studies even deciding about any deviation from policy. Although this emphasis on political legitimacy leads to a high degree of input legitimacy through criteria as 'democracy', input legitimacy based on criteria as 'involvement of actors in the decision-making process' and 'participative quality' seems to be limited, thereby undermining the social dimension of legitimacy. The result of this emphasis on the political dimension of legitimacy is that planning practitioners often cannot make any commitments to developers without political intervention, as a result of which negotiation becomes difficult and hardly seems to occur. This not only contradicts the voluntary idea that follows from Article 6.24 paragraph 1 Wro, but also questions the throughput legitimacy. In light of this emphasis on political legitimacy, tensions between political and professional judgments regarding DOs for off-site costs seem to occur regularly. However, overall most municipal respondents indicated that they do not have a lot of problems regarding DOs for off-site costs.

Additionally, multiple developers indicated that in practice problems also arise in the field of municipal elaboration, transparency and accountability regarding DOs for off-site costs in private law agreements. It often seems to be unclear what is being paid for and how the link with their own development looks like. These problems appear to be further reinforced by the redistributive nature of city-wide policy on DOs for off-site costs and outdated vision documents, as a result of which the link between the paying projects and the DOs for off-site costs is often difficult to substantiate. The proliferation of policy documents at different places does not contribute to transparency as well. Lastly, several developers seem to experience that civil servants in the negotiations sometimes lack the right knowledge to justify the requested DOs for off-site costs. The research thus shows that various problems regarding the legitimacy of DOs for off-site costs in private law agreements can occur in the Dutch planning practice.

Despite these problems, the research seems to show that usually the requested DOs can be financially included in the business case of developments. While several developers accept the principle of requesting DOs for off-site costs based on the idea that the city grows through their development, municipalities still have to legitimize the DOs for off-site costs they request according to multiple respondents. Several developers for example indicated that they do expect to see something in return in the vicinity of their development. However, the research shows that the output of the negotiations does not always have to be in line with the actual implementation of these provisions, since planning practitioners can make little or no commitment about the expenses. As a result, this study showed that a general theory about the compliance of the policy of municipalities and the agreements made seems to be missing in light of the systemic theorization of input, throughput and output legitimacy of Schmidt (2013). This study therefore adds '*implementation legitimacy*' to this distinction. In contrast to input, throughput and output legitimacy, implementation legitimacy focuses on the compliance of agreements made and the documentation and accountability of certain actions after agreement has been reached. Especially local developers indicated that they consider DOs for off-site costs as more legitimate when they see that the municipality realizes certain provisions as stated in their policy or as explained during the negotiations, as a result of which implementation legitimacy cannot be seen separately from the social and ethical dimension of legitimacy.

In light of the third sub-question of the research, concerning ways to solve these problems regarding the legitimacy of DOs for off-site costs, different solutions have been proposed from the perspective of municipalities and developers. According to several municipal respondents there is in particular a need for less confused legal frameworks with clear definitions of the different types of DOs for off-site costs and their scope. Additionally, a less rapid alternation of different laws and keeping the policy and vision documents regarding DOs for off-site costs up-to-date were mentioned as well. In this way, tensions between the static nature of policy documents and the dynamic nature of area development can be prevented as much as possible, as well as legal uncertainties about the link between the paying developments and the expenses documented in the vision document. From the developers' perspective, the problems they indicate to experience in the field of municipal elaboration, transparency and accountability seem to be mainly solved by clear policy documents regarding the subject which are findable at a logical place. Together with a clearer link between paying developments and the requested DOs, usual amounts of DOs, a higher level of openness to interest mediation, clearly formulated expenses and more municipal accountability during the negotiations. Sufficient knowledge of the municipal employees involved in the negotiations about the DOs for off-site costs and the choices made thereby seems to be unavoidable.

The following main question was central to this study: *‘How can the legitimacy of developer obligations for off-site costs in private law agreements be enhanced in Dutch municipalities?’*

Now that the three sub-questions have been answered, an answer to the main question can also be formulated. In light of the four dimensions of the concept of legitimacy, several ways have emerged to enhance the legitimacy of DOs for off-site costs in private law agreements. The research showed that in the Netherlands much emphasis is placed on political legitimacy for legitimizing DOs for off-site costs, as a result of which this dimension of legitimacy can hardly be enhanced, at most the political effectiveness. Additionally, the municipalities of the case studies seem to particularly value an enhancement of the legal dimension of legitimacy. This can be done by legally incorporating clear definitions of the types of DOs for off-site costs and their scope, as well as by a less rapid succession of different laws. Through these ways the legitimacy of the laws themselves can be increased, which will lead to more certainty about the legality of DOs for off-site costs as well. Regarding the social dimension of legitimacy, the legitimacy of DOs for off-site costs in private law agreements can in particular be enhanced by changes in the behaviour of local authorities regarding DOs for off-site costs, as well as by some policy changes. Transparent and findable policy documents which are up-to-date, usual amounts of DOs, clearer expenses with more certainty and a clear link with the development in question are key points made to enhance the social dimension of legitimacy. This can be done by for example disaggregating DOs for off-site costs per development or area in the municipality, by comparative research into amounts that other municipalities request or by only charging the full amount of costs for provisions that are a hundred percent certain. Given that several developers indicated that there is in general less acceptance in cases the viability of a development is undermined by DOs for off-site costs, subtracting the square meters of demolition from the meters on which the amount of DOs is calculated seems to enhance the social dimension of legitimacy as well. During the negotiations (throughput), a higher level of openness to interest mediation, more accountability of municipalities and sufficient knowledge of the municipal employees involved also seem to enhance the social and ethical dimension of legitimacy. Along with mainly enhancing the legitimacy of the process (throughput) and outcome (output) via these ways, more participation of developers beforehand can enhance the input legitimacy and the social dimension of legitimacy as well.

Despite all these normative criteria that seem to enhance the legitimacy of DOs for off-site costs in private law agreements, this research showed that legitimacy can be experienced differently by different actors or in different contexts, as also pointed out by Oosterhout (2001). The statement of Noyon (2017) and Krajewski (2001), that legitimacy can be seen as a hybrid form that is colored in by both the normative as empirical approach of legitimacy, is thus validated in this thesis. However, despite this context dependency, the concept of legitimacy offers a nuanced way to discuss dilemmas of appropriateness of government action that evidently arise regarding DOs for off-site costs in the Netherlands under the current legislation and soon the EPA. The concept provides a framework to have a dialogue on the different dimensions of legitimacy and the multiple interests affected, despite the intricate connections and inherent contradictions that can occur between and within the various dimensions of legitimacy. Because the research showed that the legitimacy of DOs for off-site costs can be enhanced by both input, throughput and output aspects, it is needed to look further than just political legitimacy. An over-emphasis on political legitimacy namely seems to foster legitimacy dilemmas and seems to lose sight of throughput and output aspects of legitimacy. The four separate dimensions of legitimacy must thus be viewed in conjunction to get to integrated ways of enhancing the legitimacy of DOs. Finding the solution in the further standardization of DOs for off-site costs, such as the CIL in Britain, thereby does not seem desirable in the Netherlands. Despite, a debate about whether or not to apply the PPT-criteria under private law seems inevitable in the context of enhancing the legitimacy of DOs for off-site costs in private law agreements.

## 6. Discussion & reflection

The final piece of this thesis contains the reflection on the research and its outcomes. In this chapter reflection takes places with regard to the limitations of the research. In addition, several recommendations for follow-up research are made within this chapter.

First of all, further research is needed to make the legitimacy of DOs for off-site costs in private law agreements more measurable. In this follow-up research the criteria found in this study can be tested and supplemented. It is important to include more municipalities in follow-up research than the five case studies in this research. Partly due to a wide variety of types of DOs for off-site costs in the case studies and the multiple factors that directly or indirectly seems to influence the legitimacy of DOs for off-site costs, more case studies are needed to make statements that can be generalized. Many more respondents are also needed than within this research, for example to be able to make a statistical generalization. Although the results of the research are based on a 'maximum variation' case study selection and largely seem to correspond with the quantitative research of BVHRuimte (2013) and BVHRuimte (2014), there are several limitations to the generalizability of the research as also described in paragraph 3.1.7. This limited generalizability is therefore a limitation of the research.

Another limitation of the research concerns the term 'developer obligations for off-site costs'. This term was used in the study as a collective name for the various types of DOs for off-site costs in the Netherlands and has been chosen for several reasons. First of all, there is no official English translation for the different types of DOs for off-site costs that can be distinguished under the Dutch legislation. Secondly, in the Netherlands it can often be discussed under which type of DOs several off-site costs belong. This is partly the result of a lack of clear definitions of the different types of DOs under the current Dutch legislation, as a result of which the law can sometimes be interpreted differently. Because of these two reasons, it has been chosen to use the general and international term 'developer obligations for off-site costs' in the research. Despite, it is advisable to carry out further research to the legitimacy of DOs for off-site costs in private law agreements with more emphasis on the different types of DOs that can be distinguished in the Netherlands. For example, it is possible that there may be more differences in enhancing the legitimacy of the different types or DOs separately. By means of further research these possible differences between different types of DOs in the Netherlands can be examined in more detail. Hereby it is also advisable to pay more attention to special types of DOs for off-site costs, such as DOs for social housing or DOs for parking places that cannot be realized in a development itself. In this way more nuances regarding the legitimacy of DOs for off-site costs in private law agreements can be made in follow-up research.

In a broader sense, it is also advisable to carry out further research into the five case studies of this research at a later stage. During the study, almost all municipalities of the case studies had established recent (new) policies regarding DOs for off-site costs. As a consequence, little insight could be obtained into the provisions that are actually realized from the DOs for off-site costs. The link between developments that have paid DOs for off-site costs within a municipality and the provisions that are actually realized from the total amount of DOs within a municipality therefore remains an important and interesting topic for further research. This thesis namely showed that the policy regarding DOs for off-site costs in many of the case studies can be seen as retributive, by equalizing all off-site costs at the city level. By investigating the link between the paying developments within a municipality and the provisions that are actually realized, more insight can be gained into the extent to which municipal policy regarding DOs for off-site costs actually functions as redistribution policy. As a result, this may be an interesting recommendation for follow-up research.

Another limitation of the research concerns the wish of nearly all the respondents to remain anonymous in the research. As a result, few numerical substantiations could be added in the research, since it is likely that the names of the municipalities of the case studies can be derived on the basis of this information. The objective substantiation of the findings in this research, based on policy documents or hard numbers, is therefore limited. This sensitivity of the subject also came forward when asking the municipal respondents whether it was possible to come in contact with the developers with whom they have recently negotiated. Most of the municipal respondents indicated that they would rather not have that these developers are contacted for the research, due to the sensitivity of the subject and some negotiations that are still ongoing. As a result, the proportion developers related to the case studies in the research is unfortunately limited. Some general developers have therefore been contacted to get a better picture of the social dimension of legitimacy. Nevertheless, these findings derived from the interviews with general developers could only be linked to a limited extent to the case studies of the research and caution is required. As a result, a recommendation for follow-up research would be to include more developers related to the case studies in the research, in order to be able to relate the findings more towards the case studies.

Additionally, the research showed that social legitimacy can be defined as the extent to which actions or policy are accepted by those to whom it applies. Although the perspective of private developers is included in this study to gain more insight into the social dimension of legitimacy, the perspective of housing associations is missing. Another recommendation for possible follow-up research would therefore be to include housing corporations as well in the research, to be able to add more nuance regarding the social dimension of legitimacy. Furthermore, it is advisable to include some members of the town council of the case studies as well in the research. In this way more insight can be gained into political decisions regarding DOs for off-site costs. These more detailed insights are largely missing in this research and would therefore be a valuable addition.

Another limitation of this study, which also requires follow-up research, concerns the context of DOs for off-site costs in Britain. This study seems to show that DOs for off-site costs in the Netherlands have quite a lot of similarities with the situation in Britain two decades ago. Follow-up research is needed into the context of these DOs in Britain. As a result, more insights can be obtained in the extent to which the situation in Britain is actually comparable to the situation in the Netherlands. Nevertheless, this research has shown that the situation in Britain, partly due to these similarities and the solution they have sought in the CIL, is relevant for the Netherlands. A recommendation for follow-up research would therefore be to delve deeper into DOs for off-site costs in Britain, to investigate what the Netherlands can learn from this.

Other recommendations for further research are related to investigating possible alternatives of DOs for off-site costs in the Dutch context, such as a (betterment) tax, and investigating the size of DOs for off-site costs in the Netherlands. The research has shown that there are also Dutch municipalities who do not work with DOs for off-site costs at all, as a result of which a recommendation for follow-up research would be to gain more insight into the size and scope of DOs for off-site costs in the Netherlands. Additionally, this research has shown that multiple respondents pointed at a tax as an alternative for DOs that are intended to improve the spatial quality of areas. As a result, this research can be extended by research into questions such as how realistic alternatives like a tax for quality improvement are, to what extent there is support for alternatives like this in the Netherlands and what consequences this would have regarding the different dimensions of legitimacy.

Lastly, another limitation of the research has to do with the extent to which one of the municipal case studies in the study works with private law agreements. This concerns municipality E. During the interviews it appeared that this municipality only works with private law agreements to a limited extent. The reason for this is that they particularly work with posterior agreements. As a result, the examples they could mention about private law agreements were limited. A recommendation for follow-up research is therefore to get better informed about the extent to which private law agreements are concluded based on the policy of DOs for off-site costs prior to the interviews.

Finally, considering that the EPA is expected to enter into force in 2021, it is advisable to carry out similar research when the EPA entered into force. During the research, the legislation regarding DOs for off-site costs under the Supplemental Land Property Act was not further elaborated in a degree and has not been applied in practice yet. As a result, much was unknown during the study about DOs for off-site costs under the EPA, such as whether there will be an exhaustive or non-exhaustive list for contributions to spatial developments, how 'functional cohesion' will be worked out or defined and what the new cost category list will look like. Since these legal changes cannot be viewed separately from the legitimacy of DOs, it is advisable to conduct a similar investigation under the EPA.

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# Annex I. Code tree

This code tree has been used for the analysis in ATLAS.ti and has been created in this program.

- **Utility versus necessity**
  - Motives for using DOs for off-site costs
    - Development-related motives
    - Non-development-related motives
  - Minimizing adverse impacts versus quality improvement: blurred boundaries
- **Planning policy for charging off-site costs**
  - DOs for off-site costs require policy
  - Rationales underlying the use of different calculation methods
    - Equal amount of DOs per property
    - DOs in proportion to revenue potential
    - DOs in relation to profit, proportionality and accountability
  - Static policy versus dynamic area development: municipal problems
  - Internal policy: not a matter of participation
- **The formal dimensions of legitimacy**
  - The major role of political legitimacy
  - The confused and unclear nature of legislative frameworks
    - Case law
- **The informal dimensions of legitimacy**
  - The acceptance of DOs by developers
    - The stratification of social legitimacy
    - Differences in perceived social legitimacy
      - Location factors
      - National versus local developer
  - The versatility of ethical legitimacy
    - Different views on justice
- **The negotiation process**
  - Voluntary almost never occurs
  - Mutual (in)transparency and limited accountability
- **DOs and the implementation phase**
  - From policy to implementation: municipal flexibility
  - The implementation: a political issue
- **Effects and consequences of DOs for off-site costs**
  - Financial consequences
  - Non-financial consequences
- **The future of DOs off-site costs in the Dutch planning practice**
  - (No) standardization of Dutch DOs for off-site costs
  - The Environment and Planning Act (EPA)
  - Alternative: tax

## Annex II. Overview of the respondents

Municipality	Interview number	Respondent number	Type of contribution for off-site costs	Function respondent
Municipality A	1	R1	Contributions to spatial developments*	Finance and policy maker, planning practioner
Municipality B	2	R2	(Infrastructural) provisions that benefit multiple areas, listed in 6.2.5 Bro of the current Dutch legislation**	Policy maker, planning practioner
	3	R3		Employee finance & control (Interview via mail, not finished by respondent)
	4	R4		Developer within municipality B
Municipality C	5	R5	(Infrastructural) provisions that benefit multiple areas, listed in 6.2.5 Bro of the current Dutch legislation**	Policy maker, planning practioner
	6	R6		Finance, planning practioner
	7	R7		Employee finance & control (Interview via mail)
	8	R8		Developer within municipality C
Municipality D	9	R9	Contributions to spatial developments*, (Infrastructural) provisions that benefit multiple areas, listed in 6.2.5 Bro of the current Dutch legislation ** and equalization between areas	Project leader area development, planning practioner
	10	R10		Finance, planning practioner
		R11		Finance and policy maker, planning practioner
	11	R12		Developer within municipality D
Municipality E	12	R13	(Infrastructural) provisions that benefit multiple areas, listed in 6.2.5 Bro of the current Dutch legislation	Finance, planning practioner
		R14		Finance, planning practioner
General developer I	13	R15		Developer
General developer II	14	R16		Developer
		R17		Developer
General developer III	15	R18		Developer
Expert cost recovery	16	R19		Finance, planning practioner
Involved social organization	17	R20		Jurist
Law firm	18	R21		Lawyer area development

\* Contributions to spatial developments: *‘bijdragen ruimtelijke ontwikkeling’* under the current Dutch Spatial Planning Act (Wro), recovery based on Wro 6.24 paragraph 1.

\*\* (Infrastructural) provisions that benefit multiple areas, listed in 6.2.5 Bro of the current Dutch legislation: *‘bovenwijkse voorzieningen’* in Dutch spoken language. These contributions have their origin in Article 6.2.5 of the Besluit Ruimtelijke Ordening (Bro), which is part of the current Dutch Spatial Planning Act.

## Annex III. General topic list municipalities

Note: the topic list often refers to ‘DOs’. These obligations refer specifically to DOs for off-site costs. For each interview, the questions are more specifically focused on the types of DOs that the municipality in question work with. In the topic list, ‘the municipality’ refers to the municipality where the interview is being held.

Part I: introduction	
Introduction	<ul style="list-style-type: none"> <li>- Cynthia Oorschot</li> <li>- Master student spatial planning</li> <li>- Final master thesis</li> </ul>
Research	<ul style="list-style-type: none"> <li>- Research into DOs for off-site costs (Dutch names mentioned and eventually further explained) and enhancing the legitimacy of these contributions in private law agreements.</li> </ul>
Recording, anonymity and time interview	<ul style="list-style-type: none"> <li>- Permission for recording interview, data processed anonymously. Allowed to include the name of the municipality in the research? Not shared with third parties, unless the RU requests for evidence. Agree? Interview will take approximately one hour.</li> </ul>
Question of the respondent	<ul style="list-style-type: none"> <li>- If not: start the interview</li> </ul>

Part II: Introduction in the DOs for off-site costs in the municipality and its policy	
Types of DOs and argumentation	<ul style="list-style-type: none"> <li>- <b>Types</b> DOs (referring to online documents found)</li> <li>- <b>Motive/goal/need</b></li> <li>- Year policy/updates</li> <li>- <b>Scope</b> DOs</li> <li>- <b>Added value</b></li> <li>- <b>Advantages and disadvantages? Alternatives?</b></li> </ul>
Land policy	<ul style="list-style-type: none"> <li>- <b>(Type) land policy</b></li> <li>- Relation with DOs for off-site costs</li> <li>- <b>Value increase</b> as a result of changing the zoning plan</li> </ul>
Region	<ul style="list-style-type: none"> <li>- <b>Surrounding municipalities</b></li> <li>- Competition attracting developments</li> </ul>
Internal organisation	<ul style="list-style-type: none"> <li>- <b>Involved departments</b> <ul style="list-style-type: none"> <li>▪ Division tasks/coordination</li> <li>▪ Responsibilities</li> </ul> </li> </ul>
Amount of contributions	<ul style="list-style-type: none"> <li>- <b>Amount of DOs</b></li> <li>- <b>Calculation method</b>, reason, advantages and disadvantages?</li> <li>- <b>Assumptions and Uncertainties</b></li> <li>- Linking provisions - (expected) developments</li> </ul>
Differentiation of contributions	<ul style="list-style-type: none"> <li>- <b>Differentiation categories DOs</b></li> <li>- Exceptions</li> <li>- <b>Existing city versus new developments</b></li> </ul>
Provisions	<ul style="list-style-type: none"> <li>- <b>Establishment (list) of provisions</b></li> <li>- <b>Certainty of provisions</b></li> <li>- <b>Realization of provisions</b></li> </ul>

Scope and previous steps	<ul style="list-style-type: none"> <li>- <b>Size DOs paid in municipality</b></li> <li>- Earlier steps taken?</li> </ul>
Reasonability	<ul style="list-style-type: none"> <li>- Profit, accountability and proportionality</li> <li>- <b>Reasonable and fair contribution:</b> how guaranteed?</li> </ul>
Examples	<ul style="list-style-type: none"> <li>- <b>Recent negotiations?</b></li> <li>- <b>Outcome? Process?</b></li> </ul>

### Part III: Input, throughput and output legitimacy

Policy-making process (input legitimacy), political legitimacy	<ul style="list-style-type: none"> <li>- Documentation DOs in policy</li> <li>- Preparation / drafting policy</li> <li>- <b>Participation</b></li> <li>- <b>Role politics</b></li> <li>- Representation citizens</li> <li>- Procedure establishing policy</li> </ul>
Negotiation process (throughput legitimacy)	<ul style="list-style-type: none"> <li>- When DOs requested</li> <li>- Degree DOs fully paid</li> <li>- <b>Acceptance</b> / criticism parties involved</li> <li>- <b>Justification</b> toward market parties</li> <li>- Frequently asked questions</li> <li>- <b>Possibilities negotiation/boundaries</b></li> <li>- Transparency</li> <li>- Interests during the negotiations</li> <li>- Duration negotiations</li> </ul>
Outcomes (output legitimacy)	<ul style="list-style-type: none"> <li>- Amount DOs as expected</li> <li>- Factors influencing amount of DOs received</li> <li>- <b>Contractual agreements</b></li> <li>- Acceptance outcome</li> <li>- Impact DOs</li> </ul>
Implementation phase	<ul style="list-style-type: none"> <li>- <b>Provisions realized</b></li> <li>- When/term provisions realized</li> <li>- <b>Cost overruns</b></li> <li>- Realization – policy updates</li> <li>- Surplus of DOs received</li> <li>- Shortage received DOs</li> <li>- <b>Ration income – expenses</b></li> <li>- Provisions cancelled</li> <li>- Risk of <b>undue payment</b></li> </ul>

### Part IV Dimensions of legitimacy

Legal legitimacy	<ul style="list-style-type: none"> <li>- <b>Legal framework</b> Wro/Bro + suitable</li> <li>- <b>Interpretation</b></li> <li>- <b>Uncertainties legality policy DOs</b></li> <li>- <b>Uncertainties legality requested DOs</b></li> <li>- Previous <b>lawsuits</b></li> <li>- Relevant national case law</li> </ul>
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Social legitimacy	<ul style="list-style-type: none"> <li>- <b>Attitude market parties</b></li> <li>- Factors willingness to pay market parties (types DOs, different?)</li> <li>- <b>Criticism</b> on policy/DOs</li> </ul>
Ethical legitimacy	<ul style="list-style-type: none"> <li>- <b>Justice</b> regarding DOs for off-site costs</li> <li>- <b>Fairness</b></li> <li>- Limits reasonable and fair DOs for off-site costs</li> <li>- <b>Opinion standardization DOs for off-site costs</b></li>   <li>- Definition legitimacy</li> <li>- What do you think is legitimate to ask the developer via DOs? Why?</li> <li>- <b>Enhancing legitimacy DOs for off-site costs</b></li> </ul>

Part V Context DOs for off-site costs	
Project specific factors	<ul style="list-style-type: none"> <li>- When DOs difficult to receive</li> </ul>
Market conditions	<ul style="list-style-type: none"> <li>- Influence <b>market conditions</b></li> <li>- DOs for off-site costs &amp; loss-making developments</li> </ul>
Other factors	<ul style="list-style-type: none"> <li>- <b>Other factors</b> influencing amount DOs received</li> </ul>

Part VI: Municipal problems with DOs for off-site costs	
Impediments	<ul style="list-style-type: none"> <li>- <b>Problems regarding DOs for off-site costs</b></li> <li>- Opportunities and risks DOs for off-site costs</li> </ul>
Effects and possible consequences	<ul style="list-style-type: none"> <li>- <b>Effects DOs for off-site costs</b></li> </ul>
Documentation	<ul style="list-style-type: none"> <li>- <b>Documentation expenses/income etc.</b></li> </ul>

Deel VII Reflection	
Evaluation	<ul style="list-style-type: none"> <li>- Problems municipality wanted to tackle + succeeded?</li> <li>- <b>Satisfaction</b> functioning DOs</li> <li>- Update policy/outdated policy/when adjustment policy</li> </ul>

Part VIII Ending	
Ending	<ul style="list-style-type: none"> <li>- Thanking the respondent for interview and the time, repetition for which the data is used</li> <li>- Ask about any other respondents (developers and civil servants) or recommendations</li> <li>- Interest in receiving the research when completed</li> <li>- Questions respondent?</li> </ul>

## Annex IV. General topic list private developers

Note: the topic list often refers to ‘DOs’. These obligations refer specifically to DOs for off-site costs. For each interview, the questions are more specifically focused on different types of DOs, depending on the experience of developers. Depending on whether it was a national or local developer, additional (case-specific questions) questions were asked as well.

Part I: introduction	
Introduction	<ul style="list-style-type: none"> <li>- Cynthia Oorschot</li> <li>- Master student spatial planning</li> <li>- Final master thesis</li> </ul>
Research	<ul style="list-style-type: none"> <li>- Research into DOs for off-site costs (Dutch names mentioned and eventually further explained) and enhancing the legitimacy of these contributions in private law agreements.</li> </ul>
Recording, anonymity and time interview	<ul style="list-style-type: none"> <li>- Request permission for recording interview, data processed anonymously. Allowed to include the name of the developer in the research? Not shared with third parties, unless the RU requests for evidence. Agree? Interview will take approximately one hour.</li> </ul>
Question of the respondent	<ul style="list-style-type: none"> <li>- If not: start the interview</li> </ul>

Part II: Introduction DOs for off-site costs, experiences and examples	
Introduction and examples	<ul style="list-style-type: none"> <li>- <b>Recent negotiations</b> in which DOs off-site costs requested</li> <li>- <b>Examples</b></li> <li>- <b>Type DOs for off-site costs</b></li> <li>- Attitude towards DOs</li> </ul>
Municipal policy of DOs for off-site costs	<ul style="list-style-type: none"> <li>- <b>Transparency policy</b></li> <li>- Extent that it is (often) clear why a payment is made <ul style="list-style-type: none"> <li>▪ Examples</li> </ul> </li> <li>- <b>Extent that it is (often) clear what is paid for</b> <ul style="list-style-type: none"> <li>▪ Examples</li> </ul> </li> <li>- <b>Transparency amount DOs</b></li> <li>- <b>Link development – DOs</b></li> <li>- Acceptance policy (examples)</li> <li>- Acceptance elaboration policy (examples)</li> <li>- <b>Predictability</b></li> <li>- <b>Publicity and findability policy</b></li> <li>- Accessibility policy documents</li> <li>- <b>Different calculation methods/local differences</b></li> <li>- Distribution keys calculation method</li> </ul>
Scope of the DOs	<ul style="list-style-type: none"> <li>- Opinion regarding DOs compensating for <b>external negative effects</b> of a development</li> <li>- Opinion regarding DOs based on <b>broader policy objectives/community objectives</b></li> <li>- Examples</li> <li>- PPT-criteria</li> </ul>
The (negotiation) process	<ul style="list-style-type: none"> <li>- <b>Negotiation possibilities DOs</b></li> <li>- <b>Contractual agreements</b></li> <li>- <b>DOs fully paid (or not) + reasons</b></li> </ul>

	<ul style="list-style-type: none"> <li>- Examples deviation policy + reason</li> <li>- Criticisms</li> <li>- Discussions</li> <li>- Accountability municipality</li> <li>- Payment planning / <b>DOs often presented as voluntary or mandatory</b></li> <li>- Uncertainties</li> <li>- <b>Relationship municipality – developer</b></li> <li>- Process</li> <li>- <b>Interests</b> during negotiations</li> </ul>
Willingness to pay	<ul style="list-style-type: none"> <li>- <b>Factors determining willingness to pay</b> <ul style="list-style-type: none"> <li>▪ Relation revenue potential/profit – acceptance</li> <li>▪ Relation to project risks – acceptance</li> <li>▪ Relationship market conditions – acceptance</li> <li>▪ Relationship type of provisions – acceptance</li> <li>▪ Relationship PPT-acceptance</li> <li>▪ Other factors</li> </ul> </li> <li>- <b>Increasing willingness to pay/acceptance DOs</b></li> </ul>
Outcome of negotiations	<ul style="list-style-type: none"> <li>- Satisfaction outcome (&amp; examples)</li> </ul>
Implementation	<ul style="list-style-type: none"> <li>- <b>Implementation/realization provisions</b></li> <li>- Provisions cancelled</li> <li>- Implementation in line with negotiations</li> <li>- Consequences</li> <li>- <b>Link development – benefit provisions realized (examples)</b></li> </ul>

Part III: Justness	
Justice	<ul style="list-style-type: none"> <li>- Opinion DOs that are <b>reasonable and fair</b> (Examples)</li> <li>- Increasing fairness DOs</li> <li>- Limits reasonable and equitable DOs</li> </ul>
Legitimacy	<ul style="list-style-type: none"> <li>- <b>Definition legitimacy</b></li> <li>- Legitimacy practice DOs for off-site costs</li> <li>- <b>Enhancing the legitimacy</b></li> </ul>
Results of the instrument	<ul style="list-style-type: none"> <li>- <b>Added value</b> of DOs for off-site costs</li> </ul>
Regional differences	<ul style="list-style-type: none"> <li>- <b>Experience municipal differences</b></li> <li>- Experience <b>variety of policy types</b></li> <li>- Experience <b>variety of calculation methods</b></li> <li>- Establishment of development locations &amp; influence DOs</li> <li>- <b>Standardization of the contribution</b></li> </ul>
Problems	<ul style="list-style-type: none"> <li>- <b>Experienced problems</b></li> <li>- <b>Effects DOs</b></li> <li>- <b>Possibilities to solve these problems</b></li> </ul>

Part VIII Ending	
Ending	<ul style="list-style-type: none"><li>- Thanking the respondent for interview and the time, repetition for which the data is used</li><li>- Ask about any other respondents (developers and civil servants) or recommendations</li><li>- Interest in receiving the research when completed</li><li>- Questions respondent?</li></ul>

## Annex V. Heat map housing market BPD (2019)

# Hittekaart 2019

