

Compulsory purchase



CPOs in town centres – clear and present danger yet not back to the future, says **Stan Edwards!**

Our town centre high streets have been undergoing change from the historic core retail use for some time – long before the recession which only heightened and accelerated the process. We have to be far more thoughtful as to how the state intervenes than the legacy of purely aspirational in-town retail developments of the recent past up to the recession.

*O wad some Power the giftie gie us
To see CPOs as the Courts would see us!
It wad frae mony a blunder free us,
An' foolish notion.*

We now see things through a glass darkly

Until planning policy comes face to face with the reality of empirical observations which demonstrate the dynamics of urban growth and the principles of urban economics, we will remain confronted with empty aspirational posturing against market forces. It was also mentioned in the previous article that the decisions for our towns should primarily be market based, but displaying socially responsibility. **It is the market that operates to satisfy the layers of demand.** Unfortunately planning policy's obsession with reversing extensive growth blinkers it from the negative impacts of attempting to force retail competition back into the centres, against the market flow and empirical evidence. In medicine, if the treatment is killing the patient then you stop the treatment. The issues now on the horizon stem from the necessity of restructuring and reconfiguring our town centres, by consolidating and compacting a profile of a newer mix

of use seemingly vanguarded by housing.

The nature of growth, decay and a desired stability

Growth and decay are strange bedfellows, in that they both require a movement away from a stable state. We are comfortable with growth because it is the positive one of the two, but in urban change the succession of property produces a developed (generated) state from which it can, over time, degenerate to another more stable state – back to nature. Government or even private intervention in historically failed settlements continually attempts to move them from a stable unimproved state to attempt regeneration – the Schumpeter effect. The urban specialists are going to have a field day trying to explain the truth of what is happening, whilst remembering that somewhere down the line they will be looking to be re-employed. Our greatest problem is that of being plagued by a plethora of opinion. **I keep thinking of urban specialists trying to explain what is happening to local members.** The members would say that they want the truth, but in reality it reminds of Colonel Jessop in *A few good men* – “You can't handle the truth!”

For CPOs it will be interesting that there will be a necessity to actually explain why a town centre is being treated in a certain way. My view is that we are going to get a number of different types of development, depending on where the decision makers are in the political/social grieving process for the loss of major elements of retail in a centre. The bereavement of the death of the

remembered traditional centre will mean a range of stakeholders going through the process of denial and isolation, anger, bargaining, depression and mourning, through to final acceptance¹. Applied to people, grieving is a personal process that has no time limit, nor one “right” way to do it. I have no hesitation in believing that similar conditions apply to renewing parts of our towns. I will look with amazement at the arguments for major quick fixes.

Slow, slow, slow, quick, quick...

In urban change, not everything changes at the same rate, and elements have different levels of responsiveness, duration, impact, and reversibility. Some are very fast (goods, transport and travel), some fast (workplace and housing occupancy) and some medium (employment, population). However, slower are workplaces and housing, with the slowest of all being networks and land use. In terms of town centres we have a long haul. However, there will be those who remain a long time in the earlier stages of the town centre grieving process, and it is here we will see some projects delivering “creative” early attempts at “growth” solutions. Who knows?

Sustainable development – NPPF and SSSC

Sustainable development scarcely gets mentioned outside its NPPF silo (or PPW in Wales) but it is the very thinking behind the economic, social and environmental roles that should apply to the changes taking place in the centre of our towns. I say “towns”, but the characteristics span a range of settlements from hamlets to cities.





“It was also mentioned in the previous article that the decisions for our towns should primarily be market based, but displaying socially responsibility.”

As I said in a previous article, the use of the term “high street” requires definition. It would seem that in terms of town centres it may be defined as the prime shopping street/s of a town/settlement, market place, comprising shops and commercial interests characterised by the traditional retail and other outlets expected to be found there. **This is opposed to traditional high street outlets, that can be found in non-town centre locations.** So my main focus will be on town centres.

Planning policy will find itself challenged in that in retail terms it is geared to ensure the vitality of the town centre. NPPF (part 2) focuses on town centres as the heart of the community, and to pursue policies to support their viability and vitality. This may be found to be blatantly wrong, as the policy makers eventually realise that their temporary fixes just do not work, and in many cases just accelerate the decay. It is here that a focus on sustainable development (in its purist sense) forces the assessments and viability analyses into the realm of rightly considering social impact, as well as the economic one. Promotion of competition becomes a problem when government actively encourages new trades and multi-nationals back into centres, bringing them into conflict with traditional independent traders, who desire to be protected. Again highlighted further are the issues raised in the Bromley by Bow CPO relating to the lack of quality (in socio/economic terms) of the new retail jobs when considering trade diversion and job transfer.

It is amazing that the NPPF one sentence answer at the end of the section on retail is for centres in decline a glib,

“*plan positively for their future to encourage economic activity!*” Look around – countless numbers fall into that category. Actually, the answer is to break down the silos within the NPPF, and direct that assessments are made to help achieve Sustainable Stable Settlement Centres – SSSC.

If there is one thing that space users (traders) cry out for now it is stability – growth is a bonus that can only come from a stable base. In investment terms, considering the Boston Matrix, it is almost impossible to move quickly from the situation of a low growth, low market share *DOG* to a high growth, high market share *RISING STAR*, let alone a *CASH COW*.

CPOs and funding

Immediately post war and into the 1970s, direct government funding led the way in town centre retail development, eventually giving way to private sector funding for local authority schemes in partnership with large stores and retail developers, which lasted until the recession set in. There are two elements that are now of note:

1. The recession heightened the transition of our town centre core retailing away from purely a shopping centre, more towards the role of a composite town centre.
2. Diminishing returns to in-town retail had set in, and the convenience and accessibility factors were seen elsewhere – out of town.

Given that developers see little comfort in a town centre retail renaissance it would seem that the direction for funding comes from the housing arena where there is a reserve of public cash.

Politicians are always looking for quick fixes and “early wins”, but there is a great fear that in this there will be expedient in-fills, accompanied by poorly assessed strategies leading to half-baked solutions. We can only hope that in England, Strategic Economic Plans (SEPs) are not just hastily assessed plans attempting to provide for growth wherein sits towns centres, and that Local Economic Partnerships (LEPs) will deliver more than just a quick economic growth fix.

True, early wins may be achievable by properties purchased by agreement, but more comprehensive decanting strategies are eventually going to require compulsory purchase to bring groups of properties into the public ownership to effect reconfiguration.

Compulsory purchase – Wolves in town centres

It is nearly four years since the judgment in the Wolverhampton case² was delivered. The judgment in the Supreme Court was highly useful in giving direction in terms of the specifics of the case related to connectivity between schemes, the direction of cross funding, putting the emphasis on the land subject to the CPO, and properly putting the wellbeing qualifiers to the Act in their true role.

Not only did it do that, the judgment of Lord Collins did much more. In rehearsing the precedents relating to the taking of individuals’ proprietary rights, it set the stage for a round of further CPOs where these principles had not yet been tested. The dearth of new regeneration CPOs to date has woefully meant insufficient opportunities for

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internal practitioners and external advisors to practice their trade. In the coming pressures for a political fix, it will be all the more important to repeatedly revisit Circular 06/04 general CPO principles.

I upset CPO advisors time and again by reiterating that CPOs are not difficult, and that there is no magical mystique if the rules are followed – there are not the opportunities for major fees to be earned if CPOs are properly promoted. One external advisor retorted that Circular 06/04 has no statutory status, and is guidance only.

Certainly as guidance it is standing the test of time, and is certainly the guidance the Planning Inspectors use – and apply!

Compelling case in the public interest

Lord Collins quoted Lord Denning, who said, *"I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands ..."*³

Circular 06/04 (17,18,19) states that, *"a compulsory purchase order should only be made where there is a compelling case in the public interest. An acquiring authority should be sure that the purposes for which it is making a compulsory purchase order sufficiently justify interfering with the human rights of those with an interest in the land affected. Regard should be had, in particular, to the provisions of ... the European Convention on Human Rights. The confirming Minister has to be able to take a balanced view between the intentions of the acquiring authority and the concerns of those whose interest in land it is proposed to acquire compulsorily. The more comprehensive the justification which the acquiring authority can present, the stronger its case is likely to be. Each case has to be considered on its own merits and the advice in this Circular 06/04 is not intended to imply that the confirming Minister will require any particular degree of justification for any specific order ..."*

Also, *"if an acquiring authority does not have a clear idea of how it intends to use the land which it is proposing to acquire, and cannot show that all the necessary resources are likely to be available to achieve that end within a reasonable timescale, it will be difficult to show conclusively that the compulsory acquisition of the land included in the order is justified in the public interest, at any rate at the time of its making. Parliament has always taken the view that land should only be taken compulsorily where there is clear evidence that the public benefit will outweigh the private loss."*

It is pretty clear that the confirming

Minister needs a significant amount of information and argument to consider the case.

My major gripe with retail led CPOs of the past was the lack of assessment, particularly in respect of the demonstration as to what constituted the public interest, let alone it being compelling. The dazzling production of what appeared as cloned evidence based on fulfilling planning need, number crunching, and demonstrating the compliance with the sequential test, brought competitive footloose national retail into town centres, with scant attention to the impact on the stable core trades. The problem of trade diversion *in* city centres is just as great as the perceived trade diversion *away from* city centres.

"It is like a finger pointing away to the moon. Do not concentrate on the finger or you will miss all that heavenly glory."

Bruce Lee – Enter the Dragon

An error in focus in considering just retail "need" leads to distorted plans and approaches. **The recession had the effect of heightening and accelerating the previously slow grinding forces of property succession within towns.** Given that retail in towns is no longer considered by the rational thinker as being "town (settlement) centre versus out of town", but more that of composite, polycentric networks of retail offerings, the concentration on the centre extends beyond pure replacement of "never to be retrieved" lost retail.

Eventually will come the recognition that in the public interest it may not be possible to attract significant retail back into the centres of settlements. Also, replacement with other uses may not provide satisfactory outcomes in respect of the way that town centre trader survival rates would be maintained over a protracted period of transition, through change and the natural processes of succession. It is here that government intervention is required to attempt to assess the urban dynamics taking place, and even starting to acquire vacating properties as the initial part of an overall reconfiguration strategy.

Whereas in the past we had highly "creative" retail led schemes in town centres, the limited assessments on which these were based, particularly in respect of the blasé consideration of collateral damage to existing occupiers who remained, have become exposed. Schemes of the future are going to require a greater degree of candour as to what is to be attempted and the desired outcomes.

The assessments go beyond retail, and to socio-economic structural changes that are likely to occur.

You may ask as to the point of journeying into these issues? If town centre CPOs are no longer retail led, then there has to be a greater justification from better assessed plans than there was in the past. Even in the past, the glib practically "one liner" statement in the Statement of Reasons that "there is a compelling case in the public interest" and then just a listing of the uses and floorspace for the new development was not acceptable. There has to be demonstrated greater evidence of transparent assessment and public engagement in respect of what is being attempted at the settlement core. Is it:

- reinforcement
- replacement
- displacement
- reconfiguration.

What's occurin'!?

We have to make assumptions flying in the face of planning policy, which is on catch up, that:

1. Major retail will not return in form or quantity.
2. The dynamics of a settlement to be properly assessed without any evidence of imperious immediacy of interest that would produce unintended consequences.
3. A plan to reconfigure and deliver.
4. Use the concept of Business Improvement Districts to reinforce core retained businesses.
5. Assume that housing fills in the major gaps provided that housing need can be demonstrated.

CPO power

To illustrate the point as to which CPO power to use, I will just assume two CPO powers which we will come across in, for example, a housing CPO in a town centre:

- the generally accepted prime vehicle – The Town & Country Planning Act (T&CPA) 1990 (as amended), and perhaps in some particular circumstance,
- the Housing Act 1985.

I say at the outset that the wider general power of the T&CPA is the obvious choice for a housing led mixed use CPO. I choose these two for a reason which will become clear later.

Town & Country Planning Act 1990 (as amended)

We know from previous articles that under this Act the local authority is empowered *"to acquire compulsorily any land in its area if it thinks that the acquisition will facilitate the*

carrying out of development or improvement on or in relation to the land". The only limitation to the use of Section 226 (1)(a) of the Act is Section 226 (1A) which states that a local authority must not exercise the power under Section 226 (1)(a) unless they think that the development, re-development or improvement is likely to contribute to the achievement of any one or more of the promotion or improvement of the economic/social/environmental (ESE) wellbeing of their area. This is now well rehearsed.

Housing Act 1985

Section 17. Acquisition of land for housing purposes states:

(1) A local housing authority may for the purposes of this Part –

- (a) acquire land as a site for the erection of houses,
- (b) acquire houses, or buildings which may be made suitable as houses, together with any land occupied with the houses or buildings,
- (c) acquire land proposed to be used for any purpose authorised by sections 11, 12 and 15(1) (facilities provided in connection with housing accommodation).

Section 12 of the Housing Act 1985 defines Section 17 (1)(c):

12 – Provision of shops, recreation grounds, etc.

(1) A local housing authority may, with the consent of the Secretary of State, provide and maintain in connection with housing accommodation provided by them under this Part –

- (a) buildings adapted for use as shops,
- (b) recreation grounds, and ...

The background to the Housing Act 1985 is that it is a consolidating Act that brought together provisions for housing development, and that, whereas it is for housing and nothing else, it does allow for facilities in connection with housing accommodation. I have focused on the one in Section 12 (1)(a) which relates to buildings adapted as shops. **The reason for its inclusion relates to housing schemes where there were no shops in the immediate vicinity that could be acquired to be adapted as shops.** Obviously in any case a justification for this would have to be proved. This did not mean that the Housing Act 1985 could be extended beyond its powers to deliver a housing led mixed use development scheme.

Let us rehearse what Circular 06/04 says:

- there are a large number of such enabling powers, each of which specifies the purposes for which land can be acquired under that particular legislation, and the types of acquiring authority by which it can be exercised
- the purpose for which an authority seeks to acquire land will determine the statutory power under which compulsory purchase is sought ... will influence the factors which the confirming Minister will want to take into account in determining confirmation
- authorities should look to use the most specific power available for the purpose in mind, and only use a general power where unavoidable.

So if the purpose is housing and only housing and facilities connected with housing, then the most specific power is the Housing Act 1985. If, however, the stated purposes in the authorising resolution as rehearsed in the Statement of Reasons goes beyond those powers, then the general power of the T&CPA is the obvious choice.

Circular appendices

In Circular 06/04, the guidance for the T&CPA is found in Appendix A. **The guidance for Orders made under housing powers is found in Appendix E.** Appendix E states that the acquiring authority should include in its statement of reasons (see Appendix R) for making the order, information regarding needs for the provision of further housing accommodation in its area. Where an authority has a choice between the use of housing or T&CPA powers (referred to in Appendix A), the Secretary of State will not refuse to confirm a compulsory purchase order solely on the grounds that it could have been made under another power. Where land is being assembled under planning powers for housing development, the Secretary of State will have regard to the policies set out in Appendix E.

So, as guidance, it is saying that a housing regeneration CPO, although being made under the T&CPA, will still have to provide the housing needs and other requirements of Appendix E. Note that it says nothing about being able to use the Housing Act for mixed use CPOs. We have to go back to the Wolves case here to recall Lord Collins' judgment:

"The courts have been astute to impose a strict construction on statutes expropriating private property, and to ensure that rights of compulsory acquisition granted for a

specified purpose may not be used for a different or collateral purpose."

And on modification of orders, Circular 06/04 (51) states the confirming Minister may confirm an order with or without modifications (but see paragraph 31 (06/04) about the limitations imposed by section 14 of the 1981 Act). There is, however, no scope for the confirming Minister to add to, or substitute, the statutory purpose(s) for which it was made.⁵

Banbury

The Banbury Inquiry is now over, but based on the information above, it is worth tracking to see whether, as an end of term test, the CPO should be allowed. Cherwell District Council promoted a CPO in the centre of Banbury, close to the major shopping centre, and abutting and in close proximity to a shopping frontage, which included a charity shop adjoining the CPO plots. **The CPO comprised a number of parcels in one ownership**, the main one being Crown House, a vacant and derelict building at the rear of the main street, empty for years and attracting vandals. The council wanted to acquire Crown House for redevelopment for affordable housing. The developer owner had put together schemes for redevelopment over time for a mixed use scheme. The council's scheme included the acquisition of Plot 3, part of a Tudor style block (no.18 Bridge Street) on the frontage of the main street. I shall not go into the justification or the arguments in this article – only the use of the Housing Act 1985 power by Cherwell.



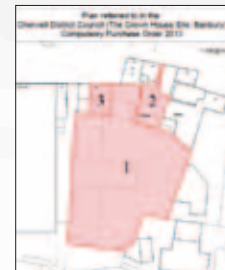
Crown House



Part of No 18 Bridge Street Banbury



Charity shop adjoining CPO land, Banbury



CPO Plan

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These are Cherwell's purposes in their own words:

The Cherwell District Council (The Crown House Site, Banbury) Compulsory Purchase Order 2013 The Housing Act 1985 and the Acquisition of Land Act 1981

The Order (Para. 1)

"... It is about to submit this Order to the Secretary of State for Communities and Local Government for confirmation. If confirmed the Secretary of State will authorise Cherwell District Council to purchase compulsorily, **for the purposes of regeneration and housing**, the land described below."

Statement of Reasons

1.2 ... "The Council has developed a scheme to regenerate the Order Land through the provision of approximately 33 new homes for rent (with ancillary parking and amenity facilities) **and a new retail unit, contributing to the wider regeneration of Banbury Town Centre.**"

3.2 ... "Section 17(1)(c) of the 1985 Act permits the Council to acquire land in connection with housing accommodation, **for the provision of shops and for other facilities which will serve a beneficial purpose, in connection with the requirements of the persons for whom the housing accommodation is provided.**"

4.2 ... "to enable **regeneration** of this long term empty and derelict site, for the provision of much needed housing which it believes is in the public interest."

6.4 ... "The Order Land currently represents a **lost opportunity for housing, retail activity and tax income.**"

7.2 ... "The proposed redevelopment scheme is being led by the Council's **Regeneration and Housing Team.**

Detailed drawings are being completed for the proposed scheme. At this stage it is anticipated that there will be at least 33 one and two bedroom rented homes (with at least one secure parking space for each home) and **a small retail unit facing onto the shopping area in Bridge Street.**"

7.6 ... "As the building within the Order Land has been empty for over twenty years, the **regeneration scheme** will not result in any loss of commercial activity or displacement of existing businesses. To the contrary, the Council's proposed scheme will enhance the local area, address amenity and health and safety issues raised by the derelict state of the Order Land, increase footfall to local businesses

and provide an additional small element of retail space, which could potentially be made available to new enterprises requiring premises. Overall there would be significant planning benefits to be achieved through the redevelopment scheme."

8.4 ... The Order Land is identified for **mixed use development** as part of a wider regeneration area, as set out by Policy S5 in the non-statutory Cherwell Local Plan 2011. Part of the Order Land is within the Town Centre Shopping Area (Policy S2)."

8.7 ... "The Order Land is identified as part of a wider area which is identified as a strategic allocation in the Proposed Submission Local Plan 2012, (Policy Ban 1 Banbury Canalside) to **deliver a housing-led mixed-use regeneration.**"

8.11 ... "It is considered that the proposal is in accordance with the Development Plan and there is **no policy which would preclude the redevelopment of the Order Land for mixed use development.**"

Based on the rules outlined previously regarding CPO powers, what say you? Is 3.2 in the Statement of Reasons what the Act specifically says? Cherwell repeatedly state their housing led mixed use purpose, notwithstanding the Housing Act power they are using. **Circular 06/04 (50) Legal difficulties**, says that, "*whilst only the Courts can rule on the validity of a compulsory purchase order, the confirming Minister would not think it right to confirm an order if it appeared to be invalid, even if there had been no objections to it. Where this is the case, the relevant Minister will issue a formal, reasoned decision refusing to confirm the order. The decision letter will be copied to all those who were entitled to be served with notice of the making and effect of the order and to any other person who made a representation.*"

Again out of Lord Collins' judgment: "*... caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights ... The terminology of 'presumption' is linked to that of 'legislative intention'. As a practical matter it means that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights ...*"⁶

If there was any doubt as to the interpretation of the Housing Act 1985, then it seems the "least interference rule kicks in".

CPOs in town centres?

It would seem that as far as the CPO powers are concerned, if CPOs are carefully scrutinized and the rules followed, that is not the problem. Lord Collins, quoting Watkins LJ, confirms:

"The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought."

Many affected by schemes in town centres where CPO powers are used will be more awake to their rights than, say, ten years ago. I say this not to be negative as to the use of CPO powers, but as a challenge not to promote any politically motivated, half-baked, poorly assessed, expedient schemes that are worryingly on the horizon. However, I am delighted to say that where such schemes may abound, that the potential claimants and Joe Public will be more aware than in the early noughties. ■

Footnotes:

1. Elisabeth Kubler-Ross 1969 "On Death and Dying."
2. R (on the application of Sainsbury's Supermarkets Ltd) (Appellant) v Wolverhampton City Council and another (Respondents) [2010] UKSC 20.
3. Prest v Secretary of State for Wales (1982) 81 LGR 193, 198.
4. see Taggart, Expropriation, Public Purpose and the Constitution, in *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC*, (1998) ed Forsyth and Hare, 91.
5. Procter & Gamble Ltd v Secretary of State for the Environment (1991) EGCS 123.
6. Attribution by Blackstone: see *Wolverhampton Case* – Lord Collins.

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