Compulsory purchase

CPOs – beware, power failure, says **Stan Edwards!**

CPO power has to be used deftly, and unless the rules are carefully followed, CPOs may be doomed to fail. Some causes of failure are constantly repeated, and those who cannot remember the past are condemned to repeat it[1].

Where is the wise?
Where is the scribe?
Where is the disputer of this world?
Hath not God made foolish the wisdom of this world?[2]

Introduction

At the end of my previous article[3], I left a cliff-hanger at the time of the close of the Inquiry into the CPO in the centre of Banbury, promoted by Cherwell District Council[4]. **The article deliberately focused on the CPO power used, and not the challenge to the justification for the CPO.** A decision has been given, with the CPO not confirmed, but not due to the power selection element – all will become a little clearer later. It is therefore opportune to also bring together some other strands relating to CPO failures over recent years.

Reasons for failure

1. **Power and interpretation**
   a. selection
   b. application.
2. **Context**
   a. justification
   b. a compelling case in the public interest
   c. a reasonable prospect the scheme will proceed
   d. planning impediments
   e. alternatives.
3. **Content**
   a. technical flaws
   b. too much land
   c. too little land
   d. flaws in evidence base.
4. **Process**

a. ability of owner to renovate, NB almost like listed building.

… all addressed fairly well in Circular 06/04.

Power and interpretation – selection

The purpose for which an authority seeks to acquire land will determine the statutory power under which compulsory purchase is sought, and that, in turn, 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[5]. Normally the scope of the intended works and their purpose will appear from the formal resolutions or documents of the acquiring authority[6].

A lesson was learned some years ago regarding an objection to a CPO in respect of an inappropriate selection of powers. **The project was a mixed used retail / housing scheme in the town centre.** The promoting authority, in partnership with a developer, had used a mixture of two powers to secure the scheme – the Local Government Act 1972 and the Town and Country Planning Act 1990 (as amended). Only one power should be used. Appendix A Circular 06/04 states, *"These powers [T&CPA 1990] are expressed in wide terms and can therefore be used by such authorities to assemble land for regeneration and other schemes where the range of activities or purposes proposed mean that no other single specific compulsory purchase power would be appropriate."*

The reason for using the LGA 1972 for acquiring part of a public park was arguably to avoid the provisions of Section 19 of the Acquisition of Land Act 1981 regarding replacement of "equally advantageous" land or Special Parliamentary Procedure.

Whereas there was a reasonable case against the justification for the Order, the decision at the Inquiry by the objectors was to concentrate on a "knockout blow" in respect of the selection of powers. **The Inspector decided to recommend confirmation of the Order,** leaving the legality of the use of the powers to that for the case for a challenge – it never was.

Banbury

Now we come to Banbury. Cherwell District Council's (the AA) decision to use the Housing Act 1985 was questionable per se, without much effort on the objector's part. Many times in making an objection for a scheme, little time is available to make a complete presentation of the reasons, and whereas in the Banbury scheme the flaws in the selection of the Housing Act power were pointed out, a marker was put down for other significant objections, which would be expanded in a Statement of Case for an Inquiry.

It will be recalled that the Order for the Housing Act (HA) CPO itself stated, *"Cherwell Council to purchase compulsorily, for the purposes of regeneration and housing."* Note that specifically the purpose of the HA is for the provision of housing not regeneration. **Given that the Housing Act 1985 is a power specifically in respect of the provision of housing, regeneration was too wide.**

In the Statement of Reasons, the AA scheme was *"to regenerate the Order Land through the provision of approximately 33*

"Normally the scope of the intended works and their purpose will appear from the formal resolutions or documents of the acquiring authority."

new homes for rent (with ancillary parking and amenity facilities) and a new retail unit, contributing to the wider regeneration of Banbury Town Centre." Additionally, misstating *"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."*

Again, *"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."* Also, *"The Order Land currently represents a **lost opportunity for** housing, **retail activity** and **tax income**."* A detailed list where the AA itself described it as *"**a housing-led mixed-use regeneration**" **and that the retail element was not focused on the housing element, but to** "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.**"* Why, given all of that, should the objector exclude the power argument from a Statement of Case for the Inquiry?

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 inquiry and decision

The Inspector, in his decision following the Inquiry, indicated that in the objection on behalf of Slighte Limited, the developer/owner, maintained that the Order was promoted under the wrong powers, but the objector's Statement of Case specifically notes that *"contrary to the position in the objection letter, no legal issue is raised as to whether the CPO was properly made under the Housing Act."*

Tactical power exclusion

Reflecting on the above "knockout" scenario, there is much prudence in focusing on the other issues of the case, apart from whether or not the correct power was used. The approach for Banbury was mainly fourfold:

1. To avoid the distraction of arguing a legal point
2. To avoid a possibility a replacement CPO
3. To focus on the owner's own regeneration plans
4. To put the affordable housing requirement in context.

Distraction avoidance

The main reason for not focusing on the inappropriate power is that it can cause a distraction. Much time could be spent on looking into the AA's intentions regarding delivering a stated wider regeneration scheme, using the HA power or delivering a retail unit not specifically for the benefit of a housing scheme, but also for wider regeneration reasons.

As it is, there were bigger fish to fry. Whereas the AA's prime argument was the provision of affordable housing and the removal of the problems of Crown House labelled derelict, Slighte had over the years put forward a number of schemes for regeneration. The AA, in including the regeneration element into the scheme, even though it was under the Housing Act, enabled Slighte to demonstrate that its two schemes put forward over the years, one for a hotel and the other private housing, were for regeneration. Discussions had taken place with the AA over the years, even including negotiations for the AA to acquire the site, but it was at a level not acceptable to Slighte. On the contrary, after Slighte refused an offer from the AA, which was below the market value of the site, the AA proceeded to make the Order. This was authorised as an urgent item in December 2012, *"in order not to prejudice the financial interests of the council"*, but it is not clarified what that means. **The council's case did not turn on any urgency,** but it rushed to promote the CPO, even though its own scheme was not even the subject of a planning application at that time.

It was unclear to Slighte whether the AA had undertaken a fair balancing exercise, as it declined to disclose even a redacted version of a report balancing the competing considerations. Related correspondence was put before the SoS, for him to draw his own inferences. The AA seemingly had not afforded any weight to Slighte's schemes to develop the land and the benefits they would bring, including the fact that Slighte would develop the Order lands without compulsory purchase, or calling on public money that is in any event reserved for the purposes of housing Cherwell's residents. Slighte had proposed two schemes for development – a hotel, restaurant and flats has planning permission, and the second, a Prior Notification scheme that would deliver 33 private residential flats, had also been approved. No impediment to either was raised, and both were acceptable in planning terms, producing planning benefits to the town centre.

The Statement of Reasons had set out a two strand justification for the Order. The primary reason is the need for affordable housing, whilst the other the regeneration benefits of bringing the site back into beneficial uses.

The Bexley Test[7]

Circular 06/2004 requires there to be a compelling reason in the public interest in support of a CPO, to justify the interference with the human rights of those with an interest in the land affected. It is a measure of last resort, and public benefit must clearly outweigh private loss. These must be weighed in the balance, as must the disbenefits of compulsory purchase. The council had not done that, or put the SoS in a position to do so, and as in Bexley, the Order could not lawfully be confirmed.

Planning

The most relevant policy that works with the emerging master plan is to promote regeneration, particularly of the Canalside area, that includes the Order Lands. Three potential schemes were before the Inquiry:

1. the AA's affordable housing scheme
2. Slighte's hotel-led mixed use scheme; and
3. Slighte's Prior Notification private residential scheme.

The AA concluded that the first two broadly comply with planning policy, but had not assessed the third, which (at

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the time of the Inquiry) has now been approved.

Hotel provision did not need justification according with policy to bring benefits to the Canalside that the DLP seeks. Those benefits were not being recognised by the AA. The only criticism of the hotel scheme relates to comprehensive development and timing, and applied equally to the council's scheme, that is not for a town centre use, but for a pocket of affordable housing.

Need for affordable housing

The benefits of affordable housing delivery were not disputed, nor were the statistics referred to by the AA, but such benefit must be weighed in the balance against interference with private property rights. The council had a fund of £7million to spend on affordable housing, but that would not warrant a CPO, as the money must be spent on housing in any event. The AA did not explain what alternatives it has considered. It seems the council had considered bringing empty properties into use, and considered other sites without recourse to CPO.

The council's intention is to provide 285 affordable units in the Canalside area, and the council promoted the DLP that will be tested to ensure it would meet the objectively assessed housing needs. The case was not made that the CPO would meet a greater need than the planning system, and development would deliver in the plan period, even if the £7million was used to provide affordable housing elsewhere. **The AA at the Inquiry stated that it did not rely on the HCA grant funding,** that was the basis for urgently seeking the CPO. Whatever the outcome of the CPO process, the monies would be put to a housing purpose by someone, but in any event, the AA's timetable was not consistent with obtaining the funding. The Section 106 obligation needed to gain planning permission required:

1. the CPO to be confirmed before the AA can take entry
2. also, a challenge period; and
3. the need to discharge eight pre-commencement conditions.

The start on site date necessary to complete by 2 January 2014 was (at the time of the Inquiry) less than four months away.

Replacement avoidance

Usually, the big worry about objecting to the use of the wrong power is that, if it is greatly significant, the Minister will be very quick to refuse confirmation. Other things being satisfactory, it is possible for a new CPO to be made adjusting the power and/or the characteristics of the scheme. However, in the case of Banbury this was tactically taken out of the equation, as no legal issue is raised as to whether the CPO was properly made under the Housing Act, limiting any possibility of a swift decision, and even a revamp of the AA's case. **As was seen above, the time constraints themselves worked against any room to manoeuvre by the AA.**

Inspector's conclusions

The Inspector concluded that all the schemes before the Inquiry would generally accord with planning policy, and would provide regeneration benefits, and there was little between the proposals in terms of impediments to implementation. Although serious need for affordable housing was acknowledged, at best, the proposal would provide less than 1% of the affordable housing planned in the plan period. In any event he deemed it likely, due to redistribution, that not all of the 40 proposed homes would be additional to the planned 285 affordable homes in the wider Canalside regeneration area. This possibility of some additional affordable homes had to be set against the draconian measure of depriving a developer of its land. In this situation, **the Inspector found that the Order is clearly not justified by a compelling case in the public interest.**

The Inspector in his conclusion again referred to Slighte's original objection, and questioned whether the power under the HA was appropriate for promoting this Order, and that Slighte's Statement of Case now specifically states that no legal issue is raised as to whether the Order was properly made.

"Although the AA's scheme would include a small retail unit, its primary purpose is to make provision for affordable housing. Paragraph 15 of Circular 06/2004 indicates that the most specific power available should be used, and a general power used only where unavoidable. The HA provides the most specific power in this case."

In noting what the Inspector says, it must however also be noted that the case in respect of the power and strict interpretation was never presented and argued before him, so now this is for another day. **I feel satisfied in myself that an Act specifically for the delivery of housing cannot be used for the purposes of wider regeneration,** particularly where the T&CPA 1990 (as amended) is the vehicle for delivering regeneration which includes housing. From this stance, it is easy to see why avoiding the discussion on power removed an unnecessary legal distraction. Weighing the *ultra vires* power argument for future CPOs may perhaps be reserved as a "knockout" for when the overall objection to the justification to CPO is weak. CPO anoraks are still left with a fruitful area for legal discourse regarding the selection of CPO power under the Housing Act - notwithstanding I feel that the argument may be easily settled by focusing on strict interpretation.

Power and interpretation – application

It is not only in the selection of the CPO power that care has to be taken, but in the application and strict interpretation of the empowering statute. Although the Wolverhampton case[8] was specific to the facts related to the strict interpretation of the T&CPA 1990 (as amended), particularly materiality and reasonably related benefits including their flow, connectivity, proximity, scale and direction, it served greatly to remind authorities, advisors and promoters of CPOs of the importance of respecting the legal structure and requirements.

Not forgetting Bromley by Bow[9]

The Inspector in the Bromley by Bow (BbB) CPO was "switched on" to the specifics of the empowering Act. Since 2004 we have become used to the empowerment of regeneration CPOs to be the Town & Country Planning Act 1990 Sect. 226 (as amended). These were not requirement of the empowerment in this case and, in avoiding these specifics of the T&CPA, the AA seemed to miss the point of complying

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with the CPO empowerment under the Local Government Planning and Land Act 1980 (LGPAL Act) Section 142. Under this statute there was a specific requirement by the acquiring authority to find alternative premises for businesses affected by the CPO.

The specific requirement of the Act is stated in the Circular that, *"so far as practicable, to assist persons or businesses whose property has been acquired, to relocate to land currently owned by the UDC."* The acquiring authority in that CPO overlooked the basic regeneration ethos of its empowering Act – **to encourage the development of both existing and new industry to achieve its regeneration objectives.**

There were additional defects regarding that CPO which, as with the London Road Fire Station, Manchester, fell foul of CPO principles, majoring upon the failure to demonstrate a compelling case in the public interest and a reasonable prospect that the scheme would proceed. In BbB in particular a spotlight was put on socio-economic impacts and that sceptically, there were no significant reasons for urgency.

Other CPOs' failure based on context, content and process

BbB was gratifying in that the Inspectorate, it seems, was giving a deeper, welcomed focus, on the guidelines and statute. Housing Act CPOs concern me. Notwithstanding the "empty houses" CPO principle is of great public interest, over familiarity, by many local authority housing CPOs, causes sausage machine attitudes and mentality. This can lead to complacency and an omission to understand the gravity of each case, and the seriousness of taking someone's proprietary rights. I know personally of one authority which was much too celebratory regarding the success of numerous "empty property" CPOs – **it can be a recipe for failure in many instances.**

Failures in CPOs have provoked a review of some of the main reasons why they fail, and many points were made by Frank Orr[10] in his presentation to the North West CPA (and future proposed work) on why some housing/planning CPO failed. Here are some cameos of failure:

Mansfield

In a Mansfield CPO, the failure was technical. In the newspaper, notices and Order maps were undated, with no street names, house numbers or local landmarks. The boundaries were not clearly delineated, and the numbering was hard to define. There was no Table 2, and no signed certificates provided.

Bridlington

Here, the Housing Act CPO case was well made out, and the Order would have been confirmed, if not for technical flaws. The Order map included part of adjoining property in error. Here, modification was possible without prejudice to the scheme. **However, the Order map failed to include a rear single storey extension** – an integral part of the dwelling house – and omitted the rear yard of the property. Consequently, description of the area of land in the schedule was materially inaccurate. In accordance with Circular 06/04 para.51, the confirming Minister may confirm an order with or without modifications with limitations.

There is, however, no scope for the confirming Minister to add to, or substitute, the statutory purpose(s) for which it was made. The power of modification is used sparingly, and not to re-write orders extensively. There is no need to modify an order solely to show a change of ownership where the acquiring authority has acquired a relevant interest or interests after submitting the order. Some minor slips can be corrected, but not significant matters, such as the substitution of a different, or insertion of an additional, purpose.

In Bridlington, there was no overall ambiguity in the council's intention, but the proposed modifications were not consented to be the Objector. Promoting authorities must follow statutory requirements as to form, content and procedure.

Kings Lynn

CPO process here led to the AA requesting a deferral of Public Inquiry. The Objector opposed deferral, and the SoS refused to sanction a deferral. This being the case, the AA wished to withdraw the CPO. GOL was minded to cancel the Inquiry, but considered the CPO award element. The Inquiry proceeded, and the AA called no evidence. To all intents and purposes, the Order was as if it was withdrawn. There is however no explicit provision in law for withdrawal of a CPO, and thus the Order was considered to stand, and accordingly the proper course would be for the Order not to be confirmed. The SoS rejected confirming plots to which no objections were extant. The case for those small areas was the same as for the rest of the Order land, and the AA could not logically maintain that some of the Order land is needed and some not.

Islington

Many times CPOs are promoted when the justification is finely balanced, as was stated by the Inspector in an Islington CPO. The Order was in respect of the disrepair of an empty "eyesore" in need of complete renovation, and the authority were able to demonstrate the need for housing. Here the Inspector admitted from the evidence presented that there was the likelihood that if the properties remain with the owners, there is a reasonable prospect of their refurbishment/redevelopment, and the residential elements being brought back into active use within a relatively short space of time. The owner's case was an intention to carry out works, planning permission was in place, and a CPO was premature. The owner indicated personal problems associated with shared ownership issues. The council was factually wrong in its belief that the properties were not occupied. **The council had no formal agreements in place with any specific RSL or developer.** The Inspector concluded a compelling case not clearly demonstrated.

Westminster

A CPO in Westminster revolved around the intentions of the parties. The Grade II Listed mid-terraced property was empty, and there had been some squatting, regarding which the owner had obtained a Possession Order. It was in a deteriorating condition, and statutory notices had been received but not complied with. The council saw it as an eyesore and a blight on the neighbourhood, and would dispose of

"The Inspector saw that the owner's actions and monies spent constituted evidence of intention to carry out works."

it to a RSL.

The owner had taken steps through managing agents, and a new professional team had been appointed, with £60k already spent, but importantly there were planning issues to be resolved, although Listed Building Consent had been granted. A revised scheme was likely to have planning officer support. The Inspector saw that the owner's actions and monies spent constituted evidence of intention to carry out works. I**t demonstrated a strong financial incentive for the owner to pursue refurbishment and conversion** – the delays were explicable.

It was not clear that the council-preferred RSL would be in any better financial position to develop than the owner. The property had no longer a blight or eyesore. The council arguably did little wrong. The owner's later actions *"provide strong evidence that the property will be brought back into use within a reasonable timeframe"*. Such a case was difficult for the SoS to decide – weight to be given to the intentions of the landowner as against previously indifferent delivery performance.

Stowmarket

The decision for a mixed use, predominately A1 scheme in a conservation area in Stowmarket is close to my heart. Its components reflected the way in which many "successful (?)" CPOs in the noughties were confirmed. An Area Action Plan was in its draft stage, and there were acknowledged benefits. However, there was little attempt at negotiating interests, and no offers made leading to the quote, *"the acquisition of land by negotiation does not accord with the guidelines."*

Additionally, there was lack of evidence of financial viability, and lack of certainty of design and content, particularly costs associated with existing users. It was also felt that, *"it has not been demonstrated that the commitment of the council's development partner has been sufficiently secured."*

Although an emerging AAP should be afforded weight, the proposed scheme included the relocation of the Untied Reformed Church, a significant community use. **This had not been tested in any statutory planning process.**

The potential impediments to implementation and planning process including the absence of any detailed policy framework, and an approved detailed scheme weighted against confirmation of the Order. It was no demonstration of a reasonable prospect the scheme would proceed if confirmed.

Dead, but will not lie down

In the light of the above, oh for a re-run in Newport! If ever there was a CPO that should have failed on so many counts, it is the John Frost Square CPO, Newport, that also involved the "Iceland" High Court referral. Previous articles[11] tracked:

- the non-compliance with policies in the Statement of Reasons, that the proposal should complement Commercial Street
- the failure of the council's preferred developer – Modus Corovest Newport Ltd. (Modus)
- the step-in by Newport CC Cabinet in 2009 resolved to take over the acquisition and progress the scheme
- Iceland Food's legal challenge on the grounds that an execution of GVD was unlawful, primarily because that the purpose was different from that for which the CPO was made and confirmed
- the failure of Iceland's challenge, but noting the Judge was not made aware by Newport CC that the details of the Modus pre-let consisted of properties at the time occupying Commercial Street
- the Judge's decision significantly held that the site was to be re-marketed on the basis of existing terms and conditions, and that the permitted scheme could (in Cabinet's view) still viably be delivered obtaining alternative funding by another developer
- Newport CC sought a developer partner and selected Queensberry Developments
- in 2013, Queensberry Developments could not obtain market funding for the scheme
- Newport CC have currently sought a £90m loan from the PWLB to pay the developer, a limited company,

to carry out the scheme.

It seems to have been lost somewhere that this was a CPO scheme where they should have fully assessed and demonstrated a compelling case in the public interest and a reasonable prospect the scheme would proceed.

Success in CPOs?

Every successive failure serves as a reminder to authorities, advisors and promoters of CPOs of the importance of respecting the legal structure and requirements.

"The road to wisdom? – Well, it's plain
and simple to express:
Err and err
and err again
but less and less and less."
Piet Hein ■

Footnotes:

1. George Santayana.
2. 1 Corinthians 1:20.
3. IRRV *Valuer* December 2013.
4. The Cherwell District Council (The Crown House Site, Banbury) Compulsory Purchase Order 2013, The Housing Act 1985 and the Acquisition of Land Act 1981.
5. ODPM Circular 06/2004 Paras. 14 and 15.
6. *Waters v Welsh Development Agency, [2004] 2 EGLR 103, Lord Nichols 63 (5).*
7. *London Borough of Bexley v SSETR (2011) EWHC Admin 323.*
8. *R (on the application of Sainsbury's Supermarkets Ltd) (Appellant) v Wolverhampton City Council and another (Respondents) [2010] UKSC 20.*
9. IRRV *Valuer* March 2012.
10. Bond Dickenson LLP Solicitors.

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