



**Stan Edwards** looks at the rules for promoting Town & Country Planning Act regeneration CPOs reflecting on some of the pointers in the Wolverhampton case<sup>1</sup>, reviewed in the last issue

# Wanderings from Wolves – attempting to demystify promoting CPOs for regeneration

## In the beginning...

There is no mystique in promoting CPOs, only a lack of knowledge, and more prevalent these days, a lack of funding. The air of mystery only feeds those who gain from its perpetuation. Admittedly local authorities have lost their source of knowledge to the private sector, but internal knowledge is capable of being learned and departments rebuilt. **The whole context of CPO is bound up in government intervention** where the market has failed to deliver projects which are necessary in the public interest. The Wolverhampton case, considered in the last issue, was salutary in reminding authorities, promoters and their advisors of the importance of respecting the legal structure and requirements to prepare a CPO. But what are the rules? Intervention for the purposes of regeneration projects takes place through empowering statutes and guidance provided in Circular 06/04<sup>2</sup>. The statutory provisions come under three basic heads:

- **Procedures:** The Acquisition of Land Act 1981 lays down the procedure for acquiring powers of compulsory acquisition and the Compulsory Purchase Act 1965 provides the procedure for taking the land. *S13 of the Local Government (Miscellaneous Provisions) Act 1976 in respect of rights.*
- **Standard codes:** The standard codes provide the basis on which compensation is paid, including:
  - The Land Compensation Act 1961 (based on 1919 rules)
  - The Land Compensation Act 1973 (as amended)
  - Planning and Compulsory Purchase Act 2004
  - Planning (Listed Buildings and Conservation Areas) Act 1990 Chapter 9.
- **Promotion:** There are many empowering statutes, including those listed in the Appendices of Circular 06/04, and it is the Circular which provides guidance on the initial steps of promoting a CPO. This article will focus on the promotional area of CPO focusing on one power – that provided by Section 226 of the Town & Country Planning Act 1990 (T&CP Act) as amended by the Planning and Compulsory Purchase Act 2004. However, before we get to that point there are some vital elements to consider.

## Justifying the project

The previous article demonstrated that upstream of a CPO is a whole process of justifying policies, programmes and projects (PPP) which may eventually require the exercise of CPO powers. Appendix A of Circular 06/04 provides a useful indication of the intended use of the power:

*“The powers in Section 226 ...are intended to provide a positive tool to help acquiring authorities with planning powers to assemble land where this is necessary to implement the proposals in their community strategies and Local Development Documents. These powers 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.”*

**It is quite explicit that the intention is to deliver PPP and community strategies**, yet the actual situation in many instances is to deliver an expedient solution as that of an ‘orphan’ superstore/mixed use regeneration scheme with shallow planning roots. Such as was the case in Raglan Street project in Wolverhampton.

In justifying a project, core essentials have to be considered:

- The Case
- Planning
- Funding
- Finance, and if necessary
- Partnership.

## The Case

Why is the project being undertaken – what is the purpose? Whatever the issues, it is essential that a local authority can demonstrate that the project is in the public interest. This is no longer just a glib statement because government policy steers authorities to consider this in terms of economic, social, environmental (ESE) well-being and sustainability, notwithstanding the additional statutory consideration of community engagement. The government has even provided its own definition as to what is the public interest (albeit from the Office of the Information



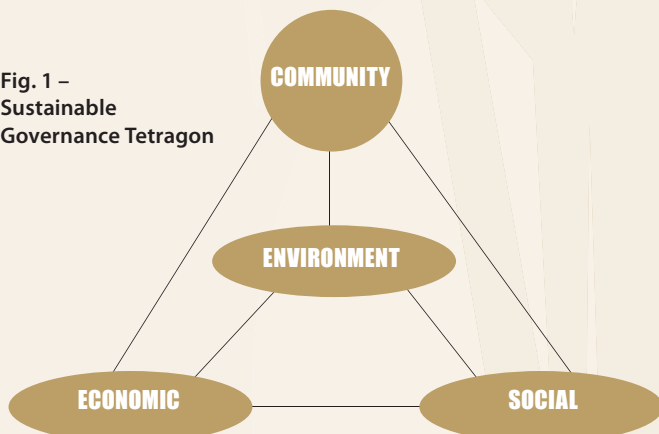
Commissioner) that fits with the wellbeing/community approach suggested above:

*"The 'public interest' refers to considerations affecting the good order and functioning of community and governmental affairs, for the well-being of citizens. In general, a public interest consideration is one which is common to all members of the community (or a substantial segment of them), and for their benefit"<sup>3</sup>.*

The decision-making process is one of Sustainable Governance, where an assessment of quadruple 'bottom line' is provided. It matters little where the emphasis lies, but that it can be demonstrated that the elements have been considered – the process is the substance. Currently the method of assessment is not prescriptive but **surely some standard will evolve**.

The elements of the case can be considered in terms of a sustainable governance tetragon<sup>4</sup> (Fig 1). (As a rider the government's 'Open Source Planning, Green Paper' includes Architecture to be part of a sustainability assessment, making the model and relationships that of a diamond instead of a tetragon, but that is for another day, particularly as the original essential ESE 'triple bottom line' approach is largely ignored)<sup>5</sup>.

Fig. 1 – Sustainable Governance Tetragon



In this way the prime elements of any scheme are considered in terms of:

ENVIRONMENT <Liveable> SOCIAL <Deliverable> COMMUNITY  
SOCIAL <Fair> ECONOMIC <Workable> COMMUNITY  
ECONOMIC <Viable> ENVIRONMENT <Compatible> COMMUNITY

So, for example, a scheme required to demonstrate just economic wellbeing would be considered in relation to it being:

- Fair – SOCIAL
- Viable – ENVIRONMENT
- Workable – COMMUNITY

In all cases the *Community* assessment would be based upon:

- SOCIAL – is it **Deliverable**
- ECONOMIC – is it **Workable**
- ENVIRONMENT – is it **Compatible**

This is apart from considering any cross-impacts within the factors, especially those of 'economic v economic', which is highly relevant in assessing impacts of retail development on existing operations in town centres.

**Suffice it to say that such assessments are a rarity**, and yet how is public interest in respect of the project demonstrated?

It was not attempted for the Raglan Street CPO in Wolverhampton. Just because it ultimately satisfied a retail impact assessment and that some social and environmental well-being issues would be resolved on a distant, off-site, development (the Royal Hospital) may not be considered as an adequate assessment of a compelling case in the public interest.

### Planning and other technical requirements

Town and country planning provides the vehicle for delivering town centre regeneration schemes. Additionally sustainability, wellbeing and community engagement are central to retail planning policy. Although focused on planning the other technical requirements such as services and highways are all included. As was seen above, the T&CP Act was meant to implement local authorities' proposals in their community strategies and Local Development Documents. Any extraneous planning applications had to satisfy the requirements of PPS6 (now PPS4) and the questionable rules

## Compulsory purchase

of the sequential test and 'need' assessment (and the new impact test). When considering planning, the benefits related to the development are assessed considering materiality, relevancy, proximity, connectivity and a reasonable relationship between project and benefits. The tests in PPS4 are whether the project is *allowed* in the public interest. The tests are more rigorous to demonstrate whether the project is so much in the public interest that it actually requires to *compel* someone's rights and interests to be taken.

It is only through the policies and programmes that composite projects can be logically and legally linked to provide a regeneration scheme covering a wide area.

These points were all considered as important to the Wolverhampton sites and, in the Supreme Court Judgement to the Raglan Street CPO, after all, **the Circular requires that the scheme would not be blocked by planning impediments**. If planning is not even assessed how would anyone ever know of the impediments: physical, planning or financial?

**“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.”**

These tests may satisfy a planning inquiry, but they do not go far enough to satisfy the strict requirements to expropriate someone's rights in a CPO.

### Funding and partnership

Traditionally, local authorities undertook the responsibility of site assembly and carried the funding burden. However, under pressure to demonstrate regeneration, partnership with developers and retail end users became prevalent. Basically the partner would fund the scheme in return for the certainty of delivery by CPO. This relationship is acceptable to local authorities who have every right to select its partner within the principles of 'best terms'. The validity of this relationship was reinforced in the Standard Commercial case<sup>6</sup>

and the judgement in the Wolverhampton case. However, in the Wolverhampton case the transactional relationship was not allowed to provide a link between the Raglan Street and Royal Hospital sites for CPO purposes. The greatest concern in these cases is that the accountable acquiring authority dog often finds it is being wagged by the developer/advisor tail!

### Sainsbury's and site value – the 'elephant in the room'

One thing needs addressing from the previous article in the area of valuation. Why did Sainsbury's change their mind twice? What happened in the final discussions between Sainsbury's and Tesco? Was it the fact that the increased site value from the intensified use was going off-site instead of to Sainsbury's? Sainsbury's obviously did not want to chance this being a compensation issue and being directed to the Lands Tribunal. This had to be tackled at the heart of the justification of the CPO.

### Justifying a CPO

When the justified project becomes so delivery critical that a compelling case in the public interest can be demonstrated, a scheme is promoted to achieve this. In fact 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<sup>7</sup>. The project must be so compelling that a high degree of certainty is required in key areas to achieve this. It will be seen from the above that the project should have been well documented as being in the public interest and the final facets to make it compelling includes certainty in:

- Finance (there must be a reasonable prospect the scheme will proceed<sup>8</sup>)
- Land assembly
- Timing
- Planning programming
- Technical.

Not only has there to be a compelling case in the public interest, but it also has to sufficiently justify interfering with the human rights of those with an interest in the land affected. 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<sup>9</sup>. Many Statements of Reasons in CPOs contain vacuous statements in respect of a compelling case and justification of

## Footnotes:

- 1 R (on the application of Sainsbury's Supermarkets Ltd) (Appellant) v Wolverhampton City Council and another (Respondents) [2010] UKSC 2.
- 2 ODPM Circular 06/2004 COMPULSORY PURCHASE and THE CRICHEL DOWN RULES.
- 3 OFFICE OF THE INFORMATION COMMISSIONER (QLD) Information Sheet – Public Interest Balancing Tests in the Freedom of Information Act Issue Date: 5 Feb 2003.
- 4 Based partly upon 'The triple bottom line of sustainability' in 'A harsh reality' by Glen Irwin in RICS Commercial Property Journal Nov/ Dec 2009 (p20).
- 5 Policy Green Paper 14.
- 6 Standard Commercial Property Securities Ltd v Glasgow City Council (No 2) [2006] UKHL 50, 2007 SC (HL) 33.
- 7 Circular 06/04 (17).
- 8 Circular 06/04 (22).
- 9 Circular 06/04 (19).
- 10 Circular 06/04 (14).
- 11 Circular 06/04 (15).
- 12 Waters v Welsh Development Agency, [2004] 2 EGLR 103, Lord Nichols 63 (5).
- 13 Town & Country Planning Act 1990 as amended by the Planning and Compulsory Purchase Act 2004.

the use of powers. The Circular clearly states that 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. Many Statements of Reasons are. **Certainly a reasonable attempt at justification of the project and resultant CPO scheme should be made** rather than just two pages of flimsy text as is sometimes the case. Once we have a project where there is a compelling case in the public interest the next stage is to consider the appropriate CPO power.

## Purposive empowerment

The Circular states<sup>10</sup> that 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. The Circular also states<sup>11</sup> that authorities should look to use the most specific power available for the purpose in mind, and only use a general power where

**“The Circular also states that authorities should look to use the most specific power available for the purpose in mind, and only use a general power where unavoidable.”**

unavoidable. But what defines ‘purpose’? Normally the scope of the intended works and their purpose will appear from the formal resolutions or documents of the acquiring authority<sup>12</sup>. These will include community strategies, Local Development Documents, permissions and approvals.

The ‘power’ has to be specific and not general, and means that there is a ‘power hierarchy’ in operation. The choice is the most Specific Power until purposes are so wide as to be *Ultra Vires*. We can have a ‘rule of thumb’:

- Use the most specific power that encapsulates the whole project
- If the content of the project goes beyond powers granted for a specific purpose then the wider power must be used.

So we can provide the example in general terms:

- **Specific e.g.** Highways Act 1980 Housing Act 1985 (as amended)
- **Wider** T&CP Act Section 226, as amended by the Planning and Compulsory Purchase Act 2004
- **Even wider e.g.** Regional Development Agency Act 1998 (RDA Act), Leasehold Reform Housing and Urban Development Act 1993 (HCA), Planning Act 2008.

In the Wolverhampton case, the power used was the most appropriate (T&CP Act) and it was on the specifics of that power (Sec226 (1) (a) that Sainsbury’s challenge was made. If the CPO was made under the wider power of the RDA Act that specific challenge could not be made. Sainsbury’s could then attempt to challenge that the power used was too wide notwithstanding that the choice of that power was not Wolverhamptons. This was the argument used in St David’s 2, Cardiff. Cardiff CC were reluctant to use T&CP Act powers because they did not encompass a regional remit. However the WDA under its Act was able to demonstrate a wider regional argument.

## Requirements of the power

The project required assessment, as did the justification of the CPO. In selecting the power, the specific requirements of the statute are to be assessed and addressed as is the accompanying guidance in the appendices of the Circular. It was demonstrated in the previous article that Section 226 (1)(a)<sup>13</sup> provides the power in the Wolverhampton case “*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*”, and that a limitation to that power is under Section (1A) relating to the well-being factors.

The most significant statement from Lord Collins in the Wolverhampton case was that “*the serious invasion of proprietary rights involved in compulsory acquisition, a strict approach to the application of these principles is required*”. In terms of CPO process, the above brings us to the point just prior to an authority seeking an Approval in Principle, but that is another tale... ■

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