Compulsory purchase

CPOs and communities – always an engagement, never a permanent marriage, says **Stan Edwards**

Until localism reared its head, community engagement was in the arena of consultation, but now communities are being given a pro-active role not only in listing community assets, but also in providing councils with further support to CPO them. The question in each case is when?

When I started to finalise the research for this article, I got a foreboding sense of *déjà vu* in respect of an article I wrote at the end of 2009[1] ? The underlying argument has not changed, even through a change of government, being faced with the same administrative mindset that has become embedded in the system over many years – same horse, different jockey. One thing of concern is that by putting two Einstein quotes together we have a definition for insanity – "doing the same thing over and over again and expecting different results", coupled with, "no problem can be solved with the same level of consciousness that created it!"

The preoccupation of government with community participation demonstrates a growing lack of confidence from the public, probably as a backlash to the lack of commitment to a realistic assessment of the public interest in delivering projects. Added to this is silo mentality in government, particularly in the way that community is separated from other planning elements. At the same time we see the courts delivering judgments in regeneration CPO related cases because developers, their advisors and partners, attempt to take advantage of defects in the planning system and avoid good practice and guidance related to community and public interest that is in place.

NPPF consultation and the Localism Bill – retail in communities

At the time of writing, the Localism Bill is being considered along with the National Planning Policy Framework (NPPF) consultation – both England only. Silos in government immediately demonstrate that policy towards retail centres creates holes in the community argument, even provoking degenerative change. How far will localism's 'duty to cooperate' survive in respect of preserving the retail integrity of a sustainable stable neighbourhood centre in protecting it from a town centre or edge of centre scheme, that fulfils the requirements of a sequential test? This is even more the case when the local authority is partnered to a 'convenience category killer' for the scheme? NPPF does not even protect the residual traditional retail of town centres by the sequential test, let alone adjoining communities in neighbourhoods. Community lip service?

The role of the community in the last decade

Going back just over ten years we see the seeds of legislation enabling more people to have a greater say in local democracy. The Local Government Act 2000 introduced a duty to promote public wellbeing, which was a step in the government's agenda towards public interest and consultation. The green paper *Planning: Delivering a Fundamental Change*, published in December 2001, set out an agenda from which flowed The Planning and Compulsory Purchase Act 2004 and the Planning Act 2008. The Local Democracy, Economic Development and Construction (LDED&C) Act 2009 evolved from the CLG consultation document *Communities in control: real people, real power 2008*, expanded the 'duty to involve' principle found in the Local Government and Public Involvement in Health Act 2007. The LDED&C 2009 Act created greater opportunities for community and individual involvement in local decision making, and provided for more involvement by local authorities in local and regional economic development. It also expanded the 'duty to respond' to petitions. The Localism Bill goes beyond that, and even eliminates the regional economic factor and RDAs. The Localism Bill ratchets up from a 'duty to involve' to a 'duty to cooperate'. Beyond that, many of the facets contained within the LDED&C Act 2009 are again rehearsed in the Localism Bill. We have to look beyond the rhetoric.

Community participation

Before we move on to Localism, Communities and CPOs, it is important that we return to community participation, which was addressed in a previous article[2] in terms Arnstein's ladder[3], which is shown as Figure 1. You will see that in terms of CPO, the highest possible level of CPO participation, empowerment, is not available to communities under the Localism Bill, because CPO empowerment, rightly, remains with the local authority. However, at the collaboration stage a community group may bring forward an asset (community or otherwise) with significant enough characteristics of demonstrating a compelling case in the public interest to justify a CPO. This is a two way street, because **it is here that the local authority has to demonstrate its 'duty to cooperate',** which means a deliberate act of collaboration with the community or neighbourhood as defined in the Bill. What communities have to settle for is community promotion using its local authority partner's powers. If the local authority, alone, was promoting the CPO according the Arnstein characteristics, it is at the policy level where there would be so much flexibility in public participation.

Figure 1

STAGE	LEVEL OF COMMUNITY INPUT
	High Level
	Empowerment (not available in respect or CPO)
POLICY	Collaboration and community promotion
PROGRAMME	Engagement
PROJECT	Involvement
DELIVERY	Consultation
CPO	Inform
	Low Level

'Added to this is silo mentality in government, particularly in the way that community is separated from other planning elements.'

Stan Edwards

'Doing the same thing over and over again and expecting different results.'

Einstein

'No problem can be solved with the same level of consciousness that created it!'

Einstein

'There's an art of knowing when. Never try to guess. Toast until it smokes and then twenty seconds less.'

Piet Hien

The community group which becomes part of a local authority collaborative CPO partnership will have to come to terms with the fact that they too have to demonstrate community engagement for CPO process purposes. The group will see that just because they have community status in terms of the CPO does not absolve them from the fact that they too (just as a developer/LA partnership) have to expose the CPO to wider community scrutiny in the public interest. **The system has to provide its checks and balances.** In Wales the saying is that has to be a bit of chwarae teg (pronounced wara teg – "fair play")!

So, therefore, the CPO project derived from community *collaboration* should in following the statement in Circular 06/04[4] be capable of being able "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". This demonstrates some measure of *engagement* at the programme stage and *involvement* at the project stage. The final stages in a properly channelled CPO to deliver policy will be through engagement and involvement to *consultation* at the delivery stage, so that when the CPO is made, all that is left is to *inform*. The simple requirement to demonstrate CPO participation is an audit trail from collaboration to delivery.

The immediate post WWII CPOs were necessarily 'top down', so that all that was needed was to inform. Things have moved a long way to local authorities collaborating in making CPOs in partnership with community groups.

Assets in the Community

The community as a CPO partner (pre and post localism)

It is evolving that the community is now able to see clearly that groups of it are able to step into the role of funder/proposer, in terms of social wellbeing, that the developer does in strictly commercial (economic) ones.

There is no barrier to a community group advancing a proposal to seek to own someone's asset that has been sitting empty for years, or not being used to the level that society holds as standard. If that community group wishes, it can buy it in the open market if the owner is willing. The problem in many of these cases is that the owner is:

a) unknown
b) unwilling
c) unwilling, and is an 'off-shore' company – a frequent case.

Frustrations by the group, commonly in the form of a Trust, can create pressure to seek the asset to be brought into the public domain through the use of compulsory purchase powers.

Well-being

Even if the concept of localism and community assets was not in place, it does not alter the fact that community groups even now engage with local authorities, as in the case of the White Rock Trust in respect of Hastings Pier[5]. Also, some Trusts throughout the country with funds can successfully partner a local authority with no funds, to promote a scheme for the benefit of society, and also deliver schemes such as social/affordable housing within the council's policies and programmes. The rationale behind this is the wellbeing provisions of the Local Government Act 2000, providing the justification for partnership in terms of the well being of the area – the public interest.

Empowerment

In terms of empowerment nothing has changed, and really it should not. An elected responsible body is the one to exercise power in the public interest. In fact the main mechanism for promoting a CPO for social or economic purposes is primarily the general workhorse of the Town & Country Planning Act1990 (as amended)[6]. Decisions have to be made as to the purpose of flowing from the LA documentation, and thereby selecting the appropriate power. Is it to be Section 226 (1)(a) of the 1990 Act, in which the acquiring authority thinks will facilitate some form of development, redevelopment or improvement of the asset, thereby triggering the Section 226 (1A) 'well-being' empowerment qualification, or the more general Section 226 (1)(b) in respect of the purposes of proper planning requiring a demonstration of a credible planning background for the acquisition? Obviously if the CPO was strictly for housing purposes, then a Housing Act CPO is the route.

Special purposes

If some of these assets are listed buildings, such as Hastings's pier, or some other such heritage site, then provided that the extent of the acquisition does not extend beyond those provided for in the empowering Act[7] in respect of listed buildings, then that Act should be used. It may be noted that pursuing the Listed Building CPO powers means additional provisions to the standard CPO guidance have to be followed. This includes elements such as the serving of a repair notice and a Magistrates Court provision where the affected party can challenge the making of a CPO on the grounds that a real attempt to repair has been made, and will continue to carry out the essential works to the building. **The Act also provides for disposal and ongoing management of the listed building asset.**

Community/heritage assets

Primarily the main requirement for a community organisation or relevant body (say a Trust) is a demonstration of its ability to manage the asset, once acquired by the local authority under a CPO and transferred to the Trust under the collaboration agreement.

Local authorities and funding

What is always uppermost in a local authority's mind is the contingency where a Trust or community body fails to maintain the acquired asset that eventually becomes an unintended liability of the authority. The local authority, the body empowered to promote a community orientated CPO, always has the public purse in mind, not only whether funding is available to effect the acquisition, but also, even if it did go ahead, what happens if for some reason the wheel comes off and the authority is stuck with a liability? The acquiring authority also has to satisfy itself that it is not just partnering with some self-interested pressure groups who may not represent the wider public. The government provisions do not make any changes to procurement law.[8]

Funding

Once the local authority is convinced that the community group has substance and can form an effective partnership, then, apart from fulfilling all the usual requirements for the CPO process, the authority may or may not have funds to put into the scheme even though it had been identified as one of its programmes. If it does not, then the funding will be expected from the community group (Trust). **Funding is the main obstacle faced by the Trust, and part of the exercise is to convince the local authority that it has the substance.** The sources of Trust funding may be considered primarily in terms such as:

a) gift
b) fund raising projects and events
c) government or Heritage Lottery grant or some other similar mechanism
d) community builders
e) community share Issue
f) any income from the ongoing project.

A prudent local authority should request a business plan that would be able demonstrate the seriousness of the Trust's purpose.

Costs

Apart from the usual CPO costs are a number of initial costs to put Trusts into the position of a credible partner:

a) costs of technical and similar appraisals
b) cost of specialist CPO advice
c) promotional costs
d) cost of legal agreements both with funders and local authorities.

Partnership agreement

The acquiring authority will not advance even a glimmer of a CPO until a legal agreement with the Trust is in place. They have to be certain that if they are seen in any way to be involved in promoting a CPO, they could end up with an unfunded liability and an ongoing management problem. The agreement and funding arrangement are also the means of demonstrating in the Statement of Reasons (SoR) that there is a reasonable prospect that the scheme will proceed.

Sequencing

It will be seen from the foregoing detail that much attention has to paid to sequencing. The normal sequencing of CPOs is well rehearsed, but it is often a problem with major funders that cannot guarantee the allocation of funds until there is a definite display of ownership and control of the asset. Also, there is always the question that even the allocation of funds may be time sensitive. **However, with a CPO, ownership cannot be guaranteed until vesting.** Apart from that, the CPO cannot be promoted without a reasonable prospect (funding) that the scheme will proceed. What a knot! The White Rock Trust overcame these issues at Hastings by creative effort, explaining this conundrum to funders, who readily saw that this could be a problem for many more heritage/Trust/local authority CPO projects, and so suitable cross-contingency arrangements were put in place, and the funding arrangements were approved.

Localism and CPO

The community Right to Buy – assets of community value

The Localism Bill provides for a wide community Right to Buy scheme, applied across all local authorities (excluding Wales) as to be prescribed in regulations.

The area of concern for landowners is the inclusion of their property in a list of community assets where, on sale of the asset, a 'relevant disposal', is first offered to the community. Assets may be nominated to the list by local groups, individuals and even local authorities, as well as using neighbourhood planning as an avenue to identify assets of community value worthy of preservation. Details of the asset and eligibility of the nominator is required, and the Bill provides an appeal mechanism in respect of listing, plus compensation details for owners regarding costs arising as a direct result of the operation of the scheme.

Compulsory purchase and localism

The Localism Bill provides no empowerment for community groups in respect of compulsory purchase, and merely highlights what they have now, with just a minor area of support set out below.

The two main compulsory purchase and compensation provisions within the current Localism Bill are:

a) the ability of communities to acquire community assets through compulsory purchase

b) the reform provisions in respect of planning assumptions in compensation.

The prime focus of this article is in respect of the first part.

a) Circular 06/04 – Appendix KA[9]

Appendix KA spells out the approach when there is a request of the community to the local authority to exercise compulsory purchase powers to acquire community assets that are in danger of being lost to the detriment of that community. **This adds another dimension in respect of CPOs to those outlined above,** and specifically refers to those community assets that have been listed. Here, local authorities should consider all requests from third parties, but particularly voluntary and community organisations which put forward a scheme for a particular asset which would require compulsory purchase to take forward, and provide, a formal response. Actually, apart from it relating to listed community assets, the approach is the same as that which currently subsists outlined above, particularly related to funding.

'A compelling case in the public interest …'

Again, as with any CPO, there is a requirement to assess whether there is **a compelling case in the public interest** for compulsory acquisition. In this case however, the local authorities should ask those making the request for such information that is necessary for them to do so. This could include:

1. the value of the asset to the community
2. the perceived threat to the asset
3. the future use of the asset
4. who would manage it (including a business plan where appropriate)
5. any planning issues
6. how the acquisition would be financed. The level of detail required should be tailored to the circumstances.

These should be of no surprise as being that which the local authorities themselves should be assessing for the compelling case of a non-community asset. Indeed a full assessment of wellbeing cross impacts would be highly desirable for all CPOs.

The areas which will need further clarification through regulations will be mainly procedural, in respect of identifying the asset in the statement of reasons, as a special consideration affecting the order site where the asset is required for the purpose of a non-community CPO.

b) Planning assumptions

The late amendment to the Localism Bill in respect of reform changes to sections 14-21 of the Land Compensation Act 1961 introduced a clause based on Law Commission recommendations, and has been promoted by the Compulsory Purchase Association and the RICS, with supporting input from the IRRV.

The place of the affected party in community/heritage CPOs

Notwithstanding the additional dimension of localism and community assets, in most situations the CPO system has remained unchanged. **Communities are no special case in terms of CPO, and the system must not be carried away with what communities may want to achieve.** Indeed, there are those in society who, at one end of the political spectrum, believe that 'all property is theft', or use the term 'irresponsible owners', and would press for more draconian powers. This is particularly unhelpful, because everyone has the right to use their property as they wish within the bounds of the law. There must always be a compelling case in the public interest and a justification to use compulsory purchase powers. The courts will soon be swift to defend the individual's right to property. Lord Collins succinctly rehearses the rights of individual owners in his judgement in the Wolverhampton case[10].

The guidance is there to demonstrate that the CPO significantly justifies 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[11].

In terms of localism and CPOs, the government has pitched it just about right, because at the end of the day it comes down to the state versus the individual and human rights factors that come into play. Community interest enters where an asset owned by an individual has significant social/community/heritage value, so much so that the acquiring authority and its partner (community) are capable of justifying the exercise of CPO powers.

Communities and engagement

In CPO terms, depending on which direction you are travelling, it comes down to either communities demonstrating substance, funding and a compelling case in the public interest, or acquiring authorities/partners engaging with communities with consultations that are early, effective and time bound, as in the judgment in the Seaport Investments case[12], that related to the EU Directive on Environmental Impact Assessments. **The judge referred to the fact that the directive requires consultation to be early and effective –** early enough to influence, and effective enough to demonstrate that influence. There is still much work to be done on defining the actual rules of engagement. ■

Footnotes:

1. RICS Land Journal February March 2010 pages 12, 13 19.
2. IRRV '*Valuer*' March 2011.
3. Based upon Arnstein, Sherry R. "A Ladder of Citizen Participation," JAIP, Vol. 35, No. 4, July 1969, pp. 216-224.
4. ODPM Circular 06/04 ... Appendix A in relation to Sec.226 of Town & Country Planning Act 1990.
5. RICS Commercial Property Journal September – October 2011 – Community Enterprise and you – Hastings Pier & White Rock Trust.
6. Town & Country Planning Act 1990 as amended by the Planning and Compulsory Purchase Act 2004.
7. Planning (Listed Buildings and Conservation Areas) Act 1990 CHAPTER 9 Chapter V Prevention of Deterioration and Damage – Section 47 Compulsory acquisition of listed building in need of repair.
8. Community Right to Challenge - Policy Statement, published 12th September 2011.
9. ODPM Circular 06/2004 – Compulsory purchase and the Crichel Down Rules.
10. R (on the application of Sainsbury's Supermarkets Ltd) (appellant) v Wolverhampton City Council and another (respondents) [2010] UKSC 20.
11. Circular 06/04 (19).
12. Seaport Investments Limited in the High Court of Justice In Northern Ireland, Queen's Bench Division (Judicial Review) Neutral Citation No. [2007] NIQB 62 WEAC5799 delivered 07/09/2007.

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