COMPULSORY PURCHASE ASSOCIATION

ANNUAL LAW REFORM LECTURE 2021

CERTIFICATES OF APPROPRIATE ALTERNATIVE DEVELOPMENT

The theory of appropriate alternative development

1. Land that is subject to compulsory purchase may have a development value that exceeds its value in its existing use.

2. In some cases, the land may benefit from existing planning permission for development that is sufficient to establish its full value in the market. In other cases, particularly where the land is proposed for compulsory purchase, its potential for development other than as part of the acquiring authority's scheme may not have been established by the grant of planning permission. Moreover, there may be no realistic prospect of securing planning permission for development other than for the acquiring authority's scheme. Nor might it be worthwhile for the land owner to spend money seeking to secure such planning permission.

3. Nevertheless, it might remain the case that, if one were to assume the acquiring authority's scheme to have been cancelled, there was at least a reasonable expectation that planning permission would be granted for another form or forms of development of the land (whether by itself or together with other land).

4. Such planning permission might be considered as likely to be forthcoming either immediately, or at a future date, depending on the circumstances known to the market at the relevant valuation date. In either event, were such planning permission to be assumed to have been granted (or were its grant to be assumed to be a certain future prospect), it might well enhance the market value of the land, since its value in the market might then be determined on the basis that it was offered for sale with the benefit of such planning permission.

The theory enacted

5. Section 14 of the Land Compensation Act 1961 **["the 1961 Act"]** enacts statutory rules that allow such planning permission to be assumed, for the purposes of assessing the value of land in accordance with land compensation rule (2) in section 5 of that Act. Development of the kind that I have broadly characterised in paragraphs 3 and 4 above is defined in section 14(4) of the 1961 Act as "appropriate alternative development" –

> *"(4)(a) it is development, on the relevant land alone or on the relevant land together with other land, other than development for which planning permission is in force at the relevant valuation date, and*
>
> *(b) on the assumptions set out in subsection (5) but otherwise in the circumstances known to the market at the relevant valuation date, planning permission for the development could at that date reasonably have been expected to be granted on an application decided –*
>
> *(i) on that date, or*
>
> *(ii) at a time after that date".*

6. The *"assumptions set out in subsection (5)"* are, essentially, that the acquiring authority's scheme of development had been cancelled on the date on which that authority gave public notice of seeking compulsory purchase powers in aid of the scheme; that no subsequent work had been done in support of that scheme; and that there was no prospect of the same scheme (or any other project designed to meet the same need) being pursued in future through the exercise of compulsory purchase powers.

7. Aside from that counterfactual, scheme cancellation assumption, the inquiry contemplated by section 14(4) of the 1961 Act, i.e. as to the present and future prospects of planning permission being granted for development of the land subject to compulsory purchase, is to be undertaken in the light of the actual, relevant facts and circumstances that are shown to have been market knowledge as at the relevant valuation date.

8. In any case in which, on the evidence, *"appropriate alternative development"* is established, the legal consequence is that stated in section 14(3) of the 1961 Act –

"(3) .... it may be assumed —

(a) that planning permission is in force at the relevant valuation date for any development that is appropriate alternative development to which subsection (4)(b)(i) applies, and

(b) that, in the case of any development that is appropriate alternative development to which subsection (4)(b)(ii) applies and subsection (4)(b)(i) does not apply, it is certain at the relevant valuation date that planning permission for that development will be granted at the later time at which at that date it could reasonably have been expected to be granted".

9. In other words, the relevant land is to be valued in accordance with land compensation rule (2) on the assumption that it was offered to the market for sale at the relevant valuation date with the benefit of planning permission for any such development, or with the certainty of planning permission being forthcoming at a future date for any such development (as the case may be), in addition to any extant planning permission from which the land benefited as at that date.

Certifying appropriate alternative development

10. In summary, a certificate of appropriate alternative development **["CAAD"]** provides a conclusive determination as to whether land subject to compulsory purchase is, or is not, to be valued as at the relevant valuation on the assumption that it had the benefit of planning permission for appropriate alternative development (or would certainly do so at a future date).

11. The statutory procedure for applications for CAADs, for their handling and determination, is set out in section 17 of the 1961 Act. At first instance, applications are made to and determined by the local planning authority within whose administrative area the land which the acquiring authority proposes to acquire is situated. Both the land owner(s) and the acquiring authority are entitled to apply for a CAAD (the *"parties directly concerned"* – section 22(1) of the 1961 Act). If either of those parties is dissatisfied with the CAAD issued by the local planning authority, they may appeal to the Upper Tribunal (Lands Chamber) **["the Upper Tribunal"]** under section 18(1) of the 1961 Act. Section 18 of the 1961 sets out the procedure for such appeals. There is

also a right of appeal if the local planning authority fails to issue a CAAD within the period allowed for that purpose (i.e. within 2 months of receipt of the application – article 3(2) of the Land Compensation Development (England) Order 2012 **["the 2012 Order]).**

12. Section 18(2) of the 1961 Act requires the Upper Tribunal to consider an appeal against a CAAD issued by the local planning authority as it the application had been made to that Tribunal in the first instance. The Tribunal is empowered, as it judges appropriate, to confirm the CAAD issued by the local planning authority, to vary its terms or to cancel it and issue a different certificate in its place.

Positive and Nil Certificates

13. Two forms of CAAD may be applied for under section 17(1) of the 1968 Act –

    (a) A certificate that, in the local planning authority's opinion, there is development that is appropriate alternative development within the meaning of section 14(3) of the 1961 Act in relation to the acquisition – a *"positive"* certificate.

    (b) A certificate that, in the local planning authority's opinion, there is no such development – a *"nil"* or *"negative"* certificate.

14. An application for a CAAD must state the applicant's opinion as to which form of certificate is being sought. If a positive certificate, the applicant must also *specify "each description of development"* that the applicant considers to be appropriate alternative development and the applicant's reasons for that opinion (section 17(3)(a)(i) and (3)(b) of the 1961 Act).

15. Section 17(5) of the 1961 Act states the required content of a positive CAAD issued by a local planning authority –

    "17(5) If a certificate under this section contains a statement under subsection (1)(a) it must also –

(a) identify every description of development (whether specified in the application or not) that in the local planning authority's opinion is, for the purposes of section 14, appropriate alternative development in relation to the acquisition concerned, and

(b) give a general indication—

(i) of any conditions to which planning permission for the development could reasonably have been expected to be subject,

(ii) of when the permission could reasonably have been expected to be granted if it is one that could reasonably have been expected to be granted only at a time after the relevant valuation date, and

(iii) of any pre-condition for granting the permission (for example, entry into an obligation) that could reasonably have been expected to have to be met".

CAADs – legal effect

16. The legal effect of a positive CAAD is stated in section 17(6) of the 1961 Act –

"17(6) If a certificate under this section contains a statement under subsection (1)(a) —

(a) then, for the purposes of section 14, development is appropriate alternative development in relation to the acquisition concerned if, and only if, it is of a description identified in accordance with subsection (5)(a) in the certificate, and

(b) the matters indicated in accordance with subsection (5)(b) in the certificate are to be taken to apply in relation to the planning permission that under section 14(3) may be assumed to be in force for that development".

17. The legal effect of a nil CAAD is stated in section 17(7) of the 1961 Act –

"17(7) If a certificate under this section contains a statement under subsection (1)(b) then, for the purposes of section 14, there is no development that is appropriate alternative development in relation to the acquisition concerned".

18. It will be seen that, in each case, the CAAD is conclusive as to the existence, extent, or absence of appropriate alternative development for the purposes of applying the planning assumption in section 14(3) of the 1961 Act.

Applications for CAADs – form and supporting information

19. Section 20 of the 1961 Act empowers the Secretary of State to make a development order for the purpose of regulating the manner in which CAAD applications and appeals made under sections 17 and 18 of the 1961 Act are to be made and dealt with.

20. Article 3(1) of the 2012 Order requires an application for a CAAD to be in writing, to include a plan or map sufficient to identify the land to which the application relates and to comply with the requirements of section 17(3) of the 1961 Act – see paragraph 14 above. Article 3(3) of the 2012 Order addresses the situation in which a local planning authority issues a CAAD otherwise than for the development described in the application or contrary to written representations made by either the land owner or the acquiring authority. In such a case, the local planning authority must state their reasons for issuing the CAAD and draw attention to the right of appeal under section 18 of the 1961 Act.

21. More detailed non-statutory guidance about the information that applicants should include in an application for a CAAD under section 17 of the 1961 Act is given in paragraph 271 of the Ministry of Housing, Communities and Local Government's Guidance on Compulsory Purchase Process and The Crichel Down Rules (2019). Paragraphs 12.1 to 12.7 of the Upper Tribunal (Lands Chamber) Practice Directions issued on 19 October 2020 give general directions on the prosecution of appeals under section 18 of the 1961 Act.

When does the right to apply for a CAAD arise?

22. The right to make an application for a CAAD under section 17(1) of the 1961 Act arises on the occurrence of any of the events described in section 22(2) of that Act; i.e. where an interest in land is "proposed to be acquired by an authority possessing compulsory purchase powers" –

> *"22(2) For the purposes of sections seventeen to nineteen of this Act, an interest in land shall be taken to be an interest proposed to be acquired by an authority*

possessing compulsory purchase powers in the following (but no other) circumstances, that is to say—

(a) where, for the purposes of a compulsory acquisition by that authority of land consisting of or including land in which that interest subsists, a notice required to be published or served in connection with that acquisition, either by an Act or by any Standing Order of either House of Parliament relating to petitions for private bills, has been published or served in accordance with that Act or Order; or

(b) where a notice requiring the purchase of that interest has been served under any enactment, and in accordance with that enactment that authority are to be deemed to have served a notice to treat in respect of that interest; or

(c) where an offer in writing has been made by or on behalf of that authority to negotiate for the purchase of that interest".

23. In summary, either the land owner or the acquiring authority may apply for a CAAD at any time after the date on which –

    (a) The acquiring authority publishes its intention to seek compulsory purchase powers in relation to the land; or

    (b) Notice to treat is deemed to have been served following a service of a blight notice or a purchase notice under Part 6 of the Town and Country Planning Act 1990; or

    (c) The acquiring authority has made a written invitation to the land owner to treat for the purchase of the land by agreement.

24. However, where a notice to treat has been served or an agreement for sale has been made with the acquiring authority, and a reference has been made to the Upper Tribunal to determine the compensation payable, an application for a CAAD may not be made other than by consent of both parties or with the permission of the Upper Tribunal (section 17(2) of the 1961 Act). Paragraph 12.4 of the Upper Tribunal (Lands Chamber) Practice Directions states that the Upper Tribunal may consolidate a section 18 appeal with the compensation reference with which it is associated; and may direct that the

section 18 appeal be determined as a preliminary issue. See, for example, *Pro Investments Ltd v Hounslow Borough Council* [2019] UKUT 0319 (LC).

Expenses incurred in connection with a section 17 application

25. Section 17(10) of the 1961 Act provides for any expenses reasonably incurred by the land owner in connection with the issue of a CAAD to be taken into account in assessing the compensation payable following compulsory acquisition. Such expenses also include those incurred in connection with an appeal under section 18 of the 1961 Act, in a case where *"any of the issues are determined in the person's favour"*.

Interaction between sections 14 and 17 of the 1961 Act

26. As will be clear from this analysis of sections 14, 17 and 18 of the 1961 Act, the owner of land that is subject to compulsory purchase is not obliged first to have applied for and secured the issue of a positive CAAD under section 17(6) of the 1961 Act, if he is to invoke the assumption in section 14(3) of that Act, *viz.* that his land is to be valued with the benefit of planning permission for appropriate alternative development.

27. On the contrary, the land owner and the acquiring authority are at liberty to reach agreement on the question whether the land should be valued with the benefit of assumed planning permission under section 14(3) of the 1961 Act. In the absence of such agreement, either party is entitled to seek the Upper Tribunal's resolution of that question, in the course of its determination of a compensation reference in respect of the land.

28. Nevertheless, it has long been accepted that the CAAD procedure can play a valuable role in avoiding or reducing uncertainty over the development potential of land that is subject to compulsory purchase; and thereby facilitate agreement of the compensation payable for that land (or failing that, narrow the differences between the parties that remain for resolution by the Upper Tribunal (or via a chosen ADR process).

29. Sections 17(2) and 22(2) of the 1961 Act indicate the underlying legislative intention that applications for a CAAD should be made early in the process of compulsory purchase (or acquisition by agreement). Paragraph 269 of the MHCLG Guidance encourages both land owners and acquiring authorities who propose to make application under section 17 of the 1961 Act to do so at an early stage, stating that it *"will assist compensation negotiations if an application is made as soon as possible"* and *"in some cases, acquiring authorities may find it convenient themselves to apply for a certificate as soon as they make a compulsory purchase order or make an offer to negotiate so that the position is clarified quickly"*.

When is an application for a CAAD likely to be helpful?

30. The 1961 Act does not itself seek to identify those kinds of case in which the CAAD procedure may be particularly appropriate with a view to facilitating the agreement or determination of compensation payable for compulsory purchase (i.e. in the alternative to simply invoking and applying sections 14(3)-(6) of the 1961 Act for the purpose of deciding whether the land to be valued benefits from assumed planning permission for appropriate alternative development).

31. There is, however, guidance on that point in paragraph 268 of the MHCLG Guidance document, which gives examples of circumstances in which CAADs might be helpful. They are where –
    (a) There is no adopted development plan covering the land to be acquired;
    (b) The adopted development plan indicates a green belt or leaves the site without specific allocation;
    (c) The site is allocated in the adopted development plan specifically for some public purpose, e.g. a new school or open space;
    (d) The amount of development which would be allowed is uncertain;
    (e) The extent and nature of planning obligations and conditions is uncertain.

32. Recent decisions of the Upper Tribunal on section 18 appeals provide some illustrations of such cases –

(1) *Leech Homes Ltd v Northumberland County Council* [2020] UKUT 0150 (LC), where the main issue was whether land compulsorily acquired for a new bypass road was within the green belt or was otherwise land to which green belt policies ought to be applied at the relevant valuation date.

(2) *Pro Investments Ltd v Hounslow Borough Council* [2019] UKUT 0319 (LC), where the main issue was the amount of residential accommodation that could reasonably be accommodated on land compulsorily acquired for a community stadium and urban regeneration scheme without unacceptable impacts on the setting of designated heritage assets in the surrounding area. The appeal also raised the question of the quantum of affordable housing that should be assumed to be required for the purposes of giving a general indication of conditions and planning obligations.

(3) *Buckley v Cheshire East Borough Council* [2020] UKUT 0075 (LC), where the main issue was whether residential development would have been permitted on land compulsorily acquired for a link road on the ground that such development would constitute limited infill in a village.

The Law Commission's recommendations

33. The statutory provisions considered above were introduced with effect from 6 April 2012 by virtue of section 232 of the Localism Act 2011. In large part, they follow the recommendations of the Law Commission in Part VIII of its Final Report "Towards a Compulsory Purchase Code: (1) Compensation" (No 286) published in December 2003.

34. In paragraph 8.25 of its report, the Law Commission commented as follows in relation to its recommended rule for identifying appropriate alternative development –

> *"This rule…is intended to embody, in much shorter and simpler terms, the general philosophy of the 1961 Act: that the subject land should be valued with the benefit of any permission which would have been expected in the absence of compulsory purchase. We do not understand the principle to be controversial".*

35. Sections 14(3) to (6) of the 1961 Act essentially enact the Law Commission's proposals in respect of appropriate alternative development. I am not aware that those provisions have proved controversial to any significant degree in their practical application since 2012.

36. As regards the CAAD procedure, the Law Commission recommended that there be an express link between the issue and contents of a CAAD following the determination of a section 17 application or a section 18 appeal, and the planning assumptions for the purposes of a rule (2) valuation under section 14 of the 1961 Act (see paragraph 8.27 of the Law Commission's report). That express link is now provided by section 17(6) of the 1961 Act (for a positive CAAD) and section 17(7) of that Act (for a nil CAAD). The position following determination of a section 18 appeal is provided for by section 17(8) of the 1961 Act. Sections 17(6) to (8) also implement the Law Commission's recommendation (in paragraph 8.30 of its report) that both a positive and a nil CAAD should be conclusive as to the existence, extent, or absence of appropriate alternative development, for the purposes of applying the planning assumptions in section 14 of the 1961 Act. Again, none of these provisions appears to have proved controversial in practice.

37. The principal change recommended by the Law Commission in respect of CAAD procedure was to substitute the Upper Tribunal in place of the Secretary of State as the appellate body for the purposes of section 18 of the 1961 Act. The rationale for that change was set out in paragraph 8.29 of the Law Commission's report –

> *"8.29 We have concluded that the right of appeal in respect of the certificate should be to the Tribunal, not to the Secretary of State or any other administrative agency. Our reasons are explained in the previous Part. This will have the logical, and in our view desirable, consequence that the Tribunal is the ultimate arbiter on all matters relevant to the determination of compensation. We recognise, however, the advantages of the certificate procedure, as administered by planning authorities, in providing a flexible method of obtaining a ruling on the planning assumptions at an early stage, including local inquiries at the appeal stage. Our proposal is dependent on the Tribunal being able to develop equally flexible and economic procedures, if necessary in co-operation with the planning inspectorate. On the basis of our discussions with the Tribunal, and other responses, we have no reason to think*

this will not be possible. We propose that the details should be covered by regulations".

38. It will be seen that section 18 of the 1961 Act in its current form has responded in part to that recommendation. The Upper Tribunal has indeed replaced the Secretary of State as the appellate body responsible for determination of appeals against CAADs issued by local planning authorities under section 17 of the 1961 Act. However, Part 3 of the 1961 Act makes no provision for the involvement of the planning inspectorate in the statutory procedures for the determination of applications for CAADs, whether at the application stage under section 17, or on appeal under section of the 1961 Act.

The Upper Tribunal's approach to discharging its appellate function

39. In practice, in discharging its appellate function under section 18 of the 1961 Act, the Upper Tribunal has rightly focused on carrying out the factual inquiry required by virtue of section 14(4)(b) of the 1961 Act; *viz.* applying the scheme cancellation assumption, but otherwise have regard to the circumstances that, on the evidence, were known to the market at the relevant valuation date, what descriptions of development (if any) could reasonably have expected to be granted planning permission on an application decided on that date or at a future date.

40. The Upper Tribunal is required to make that determination on the balance of probabilities in the light of all the evidence: see *Porter v Secretary of State* [1996] 3 All ER 693, 703-704. The Upper Tribunal has continued to follow the approach established in earlier cases such as *Essex Showground Group Ltd v Essex County Council* [2006] RVR 336 at [25] and *Urban Edge Group Ltd v London Underground Ltd* [2009] UKUT 103 at [49]-[50]. In those cases, the Upper Tribunal decided that the proper approach in applying the pre-2012 version of the statutory planning assumptions was for it to determine what a reasonable local planning authority would have decided in the circumstances to be assumed at the valuation date (rather than to seek to understand what the actual local planning authority for the area within which the land was situated would have decided).

41. In *Leech Homes Ltd v Northumberland County Council* [2020] UKUT 0150 (LC) at [22]-[23], the Upper Tribunal explored the practical implications of applying that established, objective assessment to the current statutory test for appropriate alternative development –

> *"22. ….when considering under s.14(4)(b) whether planning permission for the appellant's scheme could reasonably have been expected to be granted at the valuation date, or later, the Tribunal is not required to ask itself how Northumberland County Council is likely to have determined the notional application for consent. The Tribunal must put itself in the position of a reasonable decision maker, properly applying the law. It follows that, if, at the statutory valuation date the County Council's officers and members had a particular understanding of the meaning of a relevant development planning policy, the Tribunal is not required to adopt that understanding or to interpret the policy in the same way, but must decide for itself what the policy means, and apply it correctly.*
>
> *23. Mr Cairnes relied on the Tribunal's acknowledgement in Urban Edge at [50] that, when the Tribunal made its own determination, "evidence of actual decisions made by the planning authority will be relevant and no doubt persuasive". We agree with that statement, but it does not mean that the authority's view must be treated as conclusive, and it does not relieve the Tribunal of the duty for forming its own conclusion as to the correct understanding of the meaning of planning policy, or of forming its own judgment on its application".*

42. The Tribunal's observations in [23] of *Leech Homes Ltd* will strike a planning practitioner as an entirely consistent with the orthodox approach to determination of a planning application. See *North Wiltshire District Council v Secretary of State for the Environment* [1992] 65 P&CR 34, 112 and *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 23 at [17]-[19]. Indeed, in considering under s.14(4)(b) of the 1961 Act whether planning permission for development of the relevant land could reasonably have been expected to be granted at the relevant valuation date, or later, the Upper Tribunal has adopted the practice of directing itself by reference to the statutory duties and established principles that govern a local planning authority's determination of an application for planning permission. A recent example of the Upper Tribunal's approach is to be found in *Robert Lockwood and others v Highways England Company Ltd* [2019] UKUT 0104 (LC). In that decision, the Upper Tribunal –

(1) Applied ordinary planning principles, directing itself by reference to section 70 of the Town and Country Planning Act 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004 (*Rooff Limited v Secretary of State* [2011] EWCA Civ 435 at [5]; *Tescan Ltd v Cornwall County Council* [2014] UKUT 0408 (LC) at [65]).

(2) Considered whether the descriptions of development applied for in the CAAD application was in accordance with the development plan at the relevant valuation date and, if not, whether material considerations justified a determination otherwise than in accordance with the plan.

(3) Followed the approach to interpreting development plan policy stated by the Supreme Court in *Tesco Stores Ltd v Dundee City Council* (above) and to the evaluation of material considerations stated by the House of Lords in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636, 657.

(4) Applied the statutory duty laid down by section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 to have special regard to the desirability of preserving the setting of listed buildings.

(5) Appraised the descriptions of development proposed by the appellant against relevant policies of the statutory development plan and of the National Planning Policy Framework, having regard also to relevant parts of Planning Practice Guidance.

43. That approach to determining an appeal made under section 18 of the 1961 Act is not laid down in the 1961 Act itself. Nor is it addressed in the 2012 Order. Nevertheless, in my view, it is correct. It grapples with the underlying planning principles that should frame the factual inquiry that is required both of local planning authorities at first instance, and the Upper Tribunal on appeal, in order to make the determination whether there is appropriate alternative development within the meaning of section 14(4) of the 1961 Act. I doubt that it is controversial.

44. I am less convinced by the answer given to the question "*What should a certificate contain?"* at paragraph 274 of the MHCLG Guidance. Local planning authorities are reminded that an application made under section 17 of the 1961 *"is not a planning application"* and then advised –

> *"…to seek to come to a view, based on its assessment of the information contained within the application and of the policy context applicable at the relevant valuation date, the character of the site and its surroundings, as to whether such a development would have been acceptable to the Authority".*

45. That advice seems to me to be somewhat unhelpful. Unlike the Upper Tribunal, it does not spell out the underlying planning principles that should frame the factual inquiry that is required of local planning authorities at first instance, just as it is of the Upper Tribunal on appeal, in order to make the determination whether there is appropriate alternative development within the meaning of section 14(4) of the 1961 Act. Whereas the Upper Tribunal's approach, as exemplified in the *Lockwood* decision, is in my view clearly rooted in planning principle. I am also concerned that the question posed as to *"whether such a development would have been acceptable to the Authority"* (my emphasis) properly reflects the objective nature of the assessment as explained by the Upper Tribunal in the *Urban Edge* and *Leech* decisions (paragraphs 40 and 41 above).

Possible areas for reform

46. It will be clear from my analysis in this paper that I see no fundamental case for reform of the statutory framework for determining whether there is (or is not) appropriate alternative development under section 14 of the 1961 Act. Moreover, the new arrangements for the determination of CAAD appeals by the Upper Tribunal seem to be working effectively. The Law Commission's rationale for that change, that it was both logical and desirable for the same tribunal to be the ultimate arbiter on all matters relevant to the determination of compensation is, in my view, compelling. It is also desirable that there should be an express tie in between the outcome of the CAAD procedure in any given case and the application of the planning assumptions to the valuation of the land to be acquired in accordance with section 14 of the 1961 Act. Sections 17(6)-(8) of the 1961 Act both achieve that result and secure the conclusive

effect of a CAAD for the purposes of a rule (2) valuation, which is surely the essential rationale for the procedure.

47. There are, however, some aspects of the current law that seem to me to merit review. They are –

    (1) The date against which the CAAD application falls to be assessed.
    (2) The role of the local planning authority in the CAAD procedure.
    (3) The standardisation of information required to be supplied in support of (and in response to) an application for a CAAD.
    (4) The provision of statements of case in support of an application for a CAAD and on a subsequent section 18 appeal to the Upper Tribunal

The date against which the CAAD application falls to be assessed

48. As I have explained in paragraphs 23 and 29 above, the legislative intention underlying Part 3 of the 1961 Act is that applications for a CAAD should be made early in the process of compulsory purchase (or acquisition by agreement). I have drawn attention to paragraph 269 of the MHCLG Guidance, which encourages both land owners and acquiring authorities who propose to make application under section 17 of the 1961 Act to do so at an early stage. It is certainly well within the contemplation of sections 17(1) and 22(2) the 1961 Act that there will be many cases in which applications for CAADs will fall to be determined before the acquiring authority has taken entry of the relevant land.

49. This creates the obvious difficulty with which the Upper Tribunal had to grapple in [44]-[47] of the *Lockwood* decision. That difficulty arises because the question whether the CAAD application has identified any descriptions of alternative appropriate development falls to be determined in accordance with section 14(4)(b) of the 1961 Act; and section 14(4)(b) requires that question to be resolved, applying the cancellation assumption, but otherwise is in the circumstances known to the market at the relevant valuation date.

50. The "relevant valuation date" is to be determined in accordance with section 5A of the 1961 Act. The relevant provisions are as follows –

> *"5A(1) If the value of land is to be assessed in accordance with rule (2) in section 5, the valuation must be made as at the relevant valuation date.*
>
> *....*
>
> *(3) If the land is the subject of a notice to treat, the relevant valuation date is the earlier of—*
>
> *(a) the date when the acquiring authority enters on and takes possession of the land, and*
>
> *(b) the date when the assessment is made.*
>
> *(4) If the land is the subject of a general vesting declaration, the relevant valuation date is the earlier of—*
>
> *(a) the vesting date, and*
>
> *(b) the date when the assessment is made,*
>
> *and " general vesting declaration " and " vesting date " have the meanings given in section 2 of the Compulsory Purchase (Vesting Declarations) Act 1981.*

51. In the case of an application for a CAAD made before the acquiring authority has either given notice to treat, entered and taken possession of the relevant land or, as the case may be, made a vesting declaration in respect of that land, the relevant valuation date will be still be in the future. That is the case, because in such circumstances the determination of an application for a CAAD, or of an appeal under section 18, is not an assessment of the value of the land in accordance with rule (2) of section 5 of the 1961 Act.

52. It follows that, in such a case, the *"circumstances known to the market at the relevant valuation date"* cannot yet be ascertained; and that the factual inquiry which is the statutory basis for determining the existence or absence of appropriate alternative development cannot properly be carried out (section 14(4)(b) of the 1961 Act).

53. In [47] of the *Lockwood* decision, the Upper Tribunal resolved the difficulty in the following way –

> *"In my opinion, in circumstances such as these where a section 18 appeal has been made before entry has been taken, and where the Tribunal is not being invited to determine the compensation payable at the same time, the appellant*

must be taken to be willing to have the terms of the CAAD determined on the basis of policy at the date of determination".

54. Attractive as that may be as a pragmatic solution, it does not resolve the inherent conflict in the legislation which, as I have said, cuts directly across the underlying legislative policy of encouraging the parties directly concerned to make early use of the CAAD procedures. Paragraph 269 of the MCHLG Guidance acknowledges but does not resolve the problem –

> *"Once a compulsory purchase order comes into operation the acquiring authority should be prepared to indicate the date of entry so that a certificate can sensibly be applied for".*

55. There is an obvious case for reform to resolve this difficulty by an appropriate amendment to the 1961Act itself.

The role of the local planning authority in the CAAD procedure

56. One quite often hears concern raised about the administrative burden placed upon local planning authorities by section 17 of the 1961 Act; and the lack of obvious incentive for them to commit limited resources to a planning process that has no practical result insofar as their own development management strategy is concerned. Conversely, in cases in which the local planning authority is also the acquiring authority and so responsible for the payment of compensation (for example, in the context of compulsory purchase under section 226 of the Town and Country Planning Act 1990), the concern is sometimes raised that the local authority is effectively given the opportunity to act as judge in its own financial cause. In such cases, unless the land owner succeeds in obtaining from the local planning authority the positive CAAD for which he applies, he may be more likely to pursue an appeal, adding significantly to the cost and delay in resolving the planning assumptions and the final resolution of his compensation claim.

57. For my own perspective, it is difficult to form any solid judgment about how real, widespread or well-founded these concerns are. In my experience, members and officers of local planning authorities certainly receive training in the need for propriety

and objectivity in planning decision making. Nevertheless, a potential solution to these issues lies in that part of the Law Commission's recommendation in paragraph 8.29 of its report which has hitherto not been taken forward in the reforms to Part 3 of the 1961 Act (see paragraph 37 above).

58. The Law Commission recommended that the planning inspectorate might have a role to play in the determination of section 18 appeals under the aegis of the Upper Tribunal. As I understand it, that recommendation recognised the special expertise of planning inspectors in determining appeals against the refusal of planning permission under section 78 of the Town and Country Planning Act 1990. The planning inspectorate has established and effective procedures for determining planning appeals efficiently and in a timely way on the basis of written representations from the parties. Those procedures could be adapted to the determination of applications for CAADs under section 17 of the 1961 Act. Although, as an official in a government agency, a planning inspector is not, in strict legal terms, an independent and impartial tribunal, in practice the professionalism, independence and decision-making objectivity of planning inspectors is generally well accepted. No doubt the Law Commission had that well in mind.

59. Deployment of planning inspectors in place of local planning authorities as the decision maker at first instance under section 17 of the 1961 Act would plainly have considerable resourcing implications for the planning inspectorate, although there would be a concomitant reduction in the financial and administrative burden currently placed upon local planning authorities. The local democratic element of decision making under section 17 of the 1961 Act would be sacrificed (although it may well be that such decisions are now commonly made by local authority planning officers under delegated powers in any event). It is likely that first instance decision making by planning inspectors would lead to fewer section 18 appeals, since parties would expect the Upper Tribunal to give considerable deference to the expertise of the planning inspector. That in turn would allow the underlying legislative intention of the CAAD procedure to be realised, which is to promote early and cost effective decisions about the existence or absence of appropriate alternative development, in aid of similarly timely and cost efficient decisions on compensation claims.

The standardisation of information required to be supplied in support of (and in response to) an application for a CAAD

60. As I have explained in paragraphs 19 to 21 of this paper, neither the 1961 Act itself nor the 2012 Order gives more than very limited guidance on the information that parties should provide in support of their case on a section 17 application or a section 18 appeal. There is some more detailed and helpful guidance given in paragraph 271 of the MHCLG Guidance.

61. It would seem to be possible, at least in principle, to prescribe more standardised guidance on the information to be provided in support of an application for a CAAD (whether in positive or nil form) through a development order made under section 20 of the 1961 Act. Setting a minimum standard through a development order by (for example) expanding article 3 of the 2012 Order, would offer the opportunity to improve the efficiency in handling and determining applications for CAADs and CAAD appeals. Consideration might be given to prescribing a standardised application form, in the same way as is done for applications for planning permission. The categories of standard information that might be captured include –

    (1) Appropriate information in respect of the descriptions of development proposed in the application (number of dwellings, proposed areas and types of commercial and retail floorspace, access arrangements, site constraints, illustrative plans showing indicative layout, scale, height and massing).

    (2) Appropriate information about the surrounding area of the relevant land (transport links, designated heritage assets, nature conservation designated sites, public rights of way, development constraint designations – green belt, areas of outstanding natural beauty, heritage coasts etc).

    (3) The relevant development plan documents and any relevant supplementary planning documents (including key relevant policy references).

    (4) The relevant parts of the National Planning Policy Framework and any Planning Practice Guidance.

(5) The relevant valuation date, the scheme and the scheme cancellation date.

(6) Any extant actual planning permissions that benefit the relevant land.

(7) Whether the application proposes appropriate alternative development at a future date, and if so, the date or dates claimed.

(8) An indication of those planning conditions and planning obligations that would be required (including affordable housing, any value significant mitigation for noise, ecology etc, broad phasing proposals, any value significant construction controls).

62. The requirement to provide such information (insofar as relevant) in a standardised form in support of an application for a CAAD would, in my view, assist the efficient determination of the application and any subsequent appeal. It responds to the approach taken by the Upper Tribunal to the determination of section 18 appeals (paragraph 42 above).

The provision of statements of case in support of an application for a CAAD and on a subsequent section 18 appeal to the Upper Tribunal

63. Applicants for planning permission are used to providing a planning statement in support of their applications. The purpose of a planning statement is to describe the proposed development, to set it in its factual and planning policy context, to identify any special regulatory controls that are engaged (such as under sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 or under regulation 63 of the Conservation of Habitats and Species Regulations 2017) and to summarise the reasons why the applicant contends that the proposed development merits the grant of planning permission, subject to the imposition of appropriate conditions and planning obligations.

64. On an appeal against a refusal of planning permission, the parties are required to provide detailed statements of case in support of the appeal (and in response to the

appeal). That requirement applies whether the appeal is to proceed in writing or through a hearing or local inquiry.

65. It seems to me that the introduction of a specific requirement for parties to submit a planning statement in support of an application for a CAAD would offer the opportunity to improve timely and efficient handling of the application. In the case of an application for a positive certificate, the planning statement would summarise the case for certifying the descriptions of development applied for – the template being essentially the planning principles identified by the Upper Tribunal in case such as the *Lockwood* decision. In the case of an application for a nil certificate, the planning statement would follow essentially the same approach in order to explain why there was no description of development of the relevant land (beyond any extant actual planning permission) reasonably likely to be granted planning permission either at the relevant valuation date on at a future date.

66. At the appeal stage, it is my experience that statements of case both in support of and in response to a section 18 appeal are typically drafted by counsel or solicitors. The detailed planning case is then presented through expert reports. It may be helpful to consider the introduction of a requirement for a planning statement to be provided in support of (or in response to) the appeal alongside the statement of case. Such a planning statement would be expected to be an updated version of the planning statement submitted at the application stage, taking account of the determination of the CAAD application and explaining, from a planning point of view, why the appeal was and was not meritorious; and stating with reasons the justification for any variation to of substitution of the issued CAAD, as contended for on the appeal.

67. I have chosen not to comment in this paper on this decision. The Court of Appeal is to hear the Secretary of State's appeal against the Upper Tribunal's decision on 21 April 2021. There is also a respondent notice. In the circumstances, it seem idle to speculate now on the possible outcome and where that might lead in terms of possible legislative reform.

Timothy Mould QC 25 March 2021
Landmark Chambers