Practice&Law

LEARNING FROM THE AMERICAN WAY

Compulsory purchase Richard Guyatt and Colin Smith compare the UK's compulsory purchase regime to that in the US, and make a case for fundamental reform on this side of the Atlantic

The UK's compulsory purchase law has its roots in Acts for canal building in the 18th century and, more significantly, the mid-19th century railway legislation. Little has changed from the general approach forged in a rapidly industrialising, but still largely agrarian society. Victorian terminology and "values" are still with us nearly 200 years later.

There has been fairly constant tinkering with the legislation since, in the 1960s and 1970s (during the motorway building boom) and again in recent years. The Planning and Compulsory Purchase Act 2004, Planning Act 2008, Localism Act 2011, Growth and Infrastructure Act 2013 and the Housing & Planning Bill have all dabbled. But all the changes concentrate on specific and minor issues.

The compulsory purchase system has served the country well. The land and rights for new towns and urban regeneration, motorways and trunk roads, railways, airports, electricity and gas, water and sewage have all relied on compulsory purchase orders ("CPOs"). But modern society is far less accepting and much more ready to challenge than was the case when the principles for compulsory purchase were established, and ownership patterns are more complex and diverse.

Is it time to think again about the

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foundations of how land expropriation is administered, determined and practiced?

Stalled reform

More than a decade ago, the Law Commission issued two reports proposing fundamental reforms to compulsory purchase and the law and procedure for compensation: *Towards a Compulsory Purchase Code – Compensation* in December 2003 and T*owards a Compulsory Purchase Code – Procedure* in December 2004. Widely applauded by practitioners, the reports were shelved by the then Labour government, on the basis that the process of reform would just be too complex.

Subsequently the Compulsory Purchase Association ("CPA") has kept up the pressure. Many of the changes in recent Acts have been initiated at its suggestion. It is clear that the relevant government departments are listening.

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The changes help, but the inherent inadequacies of the current system remain. A number of advantages would ensue from a fundamental change in how land assembly occurs.

The traditional approach

The processes for compulsory purchase can be summed up in a few short sentences. In essence:

1. No-one should have their land taken away without the appropriate legal process;
2. This process must have its origins in parliament, either in an Act or through a process where parliament delegates the decision making process to a minister;
3. Those to be dispossessed have the right to have their objections considered by the decision maker; and
4. Parties affected are entitled to "just" compensation to put them, so far as money is able to do so, in the same position as if the dispossession had not occurred.

The origins of these principles can be found as far back as Magna Carta, and are common in virtually all jurisdictions beyond our shores. They are sound and should be immutable. It is essential that any process of expropriation is seen as fair, credible and providing an appropriate balance between the public needs and the private individual's interest.

The existing compulsory purchase system largely fulfils these principles.

Forcible possession is rare, as is protester disruption to projects. This suggests that at least the process of authorising compulsory purchase is one that our society sees as fair.

However, small businesses in particular rarely see the process of assessing compensation as fair and reasonable. Many feel that they were not listened to, and that the acquiring authority did not respect their concerns. In most instances owners and occupiers have their premises taken before any payment of compensation is made and, while professional fees are often reimbursed promptly, claimants are left to fend for themselves in terms of securing relocation sites, funding and compensation.

Where the UK is at the vanguard

There is much in the UK compulsory purchase process that is world-respected. The UK's processes for authorising land assembly is respected in other jurisdictions, and there is certainly much to be proud of in terms of the rule of law. It is clear that the UK's principles of blight and injurious affection for the physical effects of public works (ironically both often criticised in our own jurisdiction) are bonus features to many practitioners versed in other jurisdictions.

However, blight processes exist because we take far longer to deliver our projects than most other countries, resulting in a much greater length of time when blight is an issue. The more crowded nature of the UK also means that physical effects of works has to be compensated for, as so many find public works imposed close to them.

How we can learn from others

When the UK system is compared to that in the US, particularly where federal funding is engaged, the UK does not provide the appropriate balance between those assembling land and those being dispossessed.

In the US, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 requires that any scheme spending federal money must demonstrate negotiation in good faith with any residential tenant, small business or farm operation. Reasonable endeavours must be used to secure the relocation of the dispossessed person.

For the acquirer it is a hands-on process with practical assistance and support. A process of appraisal is carried out to assess value early on. Rather than create years of uncertainty about the process of authorising a CPO, compensation is discussed before expropriation can be embarked on.

All too frequently here, the secretary of state authorises a CPO following an inquiry where the acquiring authority (usually through its development partner) simply assures the secretary of state that negotiations continue. Because the principle of any order confirming process is that compensation is not a matter for the inquiry, it is easy for acquiring authorities to go through the motions. Often only lip service is being paid – not a genuine commitment to provide timely compensation, removing the need for the claimant to finance the relocation process.

Should those finding themselves in the red line of a compulsory purchase order suffer years of uncertainty, risk and lack of ability to plan while occupying land that they cannot move from, because of the desire of another body promoting a CPO to profit from taking that land at an undetermined time?

The current CPO guidance in the UK (*Compulsory purchase process and the Crichel Down Rules*, Department for Communities and Local Government, 29 October 2015) suggests that compulsory purchase is a "last resort" power and that an acquiring authority must, as part of its compelling case in the public interest, demonstrate that reasonable endeavours have been used to secure land by agreement. But frequently this principle is largely disregarded by acquiring authorities and those backing them. It is rarely an issue pursued by inspectors at inquiry. Acquiring authorities and developers should be put to proof on this vitally important point.

A cultural change is necessary

Acquiring authorities' advisors should use the "compensation code" not as a weapon but as a guide. Achieving certainty and speed of resolution is to everyone's advantage.

An increased obligation on acquiring authorities to demonstrate reasonable efforts at negotiation have been undertaken should go hand in hand with a faster compulsory purchase process.

For those being dispossessed, upfront negotiation and clarity of offer has huge advantage – the principal criticism from a company or person being relocated is usually the long period of uncertainty, which leads to resentment and distrust. If both parties know the imperative on an acquiring authority to achieve relocation – albeit not at any price – with a clear threshold, after which expropriation will be swift if an owner will not come to the table, it is more likely that negotiations will succeed.

Compulsory purchase will always be controversial, difficult and stressful. More consensus, required by a revised and clear set of rules for early negotiation, benefits all by providing clarity, reducing risk and increasing speed. Both sides to the process should know that little is to be gained financially by either of them holding out or undervaluing.

In short, the UK needs a system where confrontation is replaced, to the extent that it can be, by a process where both parties understand each other's goals and timing issues from the outset and work together to achieve successful relocation, if there are sound public reasons for land assembly to occur. This largely cultural change would reduce time, cost and stress for both sides and lead to a "win-win" situation, where infrastructure is delivered more swiftly and with far less disruption for those who have to make way.

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