Compulsory Purchase Association
Response to Consultation on Compulsory Purchase Circular
June 2015

To: Robert Segall
CPO Consultation Team
Planning Directorate
Department for Communities and Local Government
Third Floor NE
Fry Building
2 Marsham Street
SW1P 4DF

Email to: CPOConsultation@communities.gsi.gov.uk

1 Introduction

1.1 This document is submitted on behalf of the Compulsory Purchase Association (**CPA**).

1.2 CPA's objective is to work for the public benefit in relation to compulsory purchase and compensation in all its forms. This includes promoting the highest professional standards amongst practitioners at all levels and participating in debate as to matters of current interest in compulsory purchase and compensation.

1.3 CPA has some 600 members practising in this field, including surveyors, lawyers, accountants, planners and officers of public authorities.

1.4 This consultation response has been formulated following discussions within the National Committee of CPA.

1.5 A separate response is provided for the response to the Technical Reform Consultation Paper.

1.6 CPA is grateful to both DCLG and HM Treasury for their participation in CPA events and engagement with CPA on matters of reform of the Compulsory Purchase process. We remain available to assist Government in its evaluation of CPO law and practice.

* Your Details

Name: Richard Guyatt

Organisation (if applicable): Compulsory Purchase Association

Position/Job Title: Vice Chair

Address: C/O 3 Temple Quay, Temple Back East, Bristol

Postcode: BS1 6DZ

Email:richard.guyatt@bonddickinson.com

Phone number: 0117 989 6877

PARA 2

Adding “the Government believes that…” to the front of the draft text will carry forward a key message from the existing guidance in Circ. 06/04.

The list of outcomes should include “essential infrastructure”.

PARA 3

The first sentence of the first paragraph should be amended to read “acquiring authorities should use compulsory purchase powers **when they are satisfied that it is** expedient to do so”. This will better enable the AA to make the judgement as to at what point the powers should be used.

The first sentence of the second paragraph could be usefully amended to make it clearer that AAs should continue to seek to acquire by agreement at all stages up to the Inquiry. Our suggested wording is:

“Acquiring authorities will be expected, at the time of the Public Inquiry, to demonstrate that they have taken reasonable steps to acquire all of the land and rights included in the Order by agreement.”

The current difficulty which AAs have with regard to the “last resort” requirement could be usefully resolved by making it clear that CPO should be used as the last resort for the delivery of the scheme rather than for each individual plot. This might be achieved by amending the first sentence of the third paragraph to read:

“Compulsory purchase is intended as a last resort **to secure the assembly of all the land needed for the implementation of important regeneration, development and infrastructure projects**”.

PARA 11

Use of general power "where unavoidable" – this appears to set too high a burden. We would suggest "when a specific power is not appropriate".

Further, the statement that acquiring authorities should "pay attention to" legislative requirements suggests more discretion than exists. We would propose "adhere to" instead.

PARA 13

The last sentence does not appear to be sufficiently compelling. We would suggest:

"It is not essential to show that land is required immediately to secure the purpose for which it is to be acquired, but a confirming minister will need to understand, and the acquiring authority must be able to demonstrate, that there are sufficiently compelling reasons for the powers to be sought at this time.

PARA 14

In para 14b the question of whether "funding" is available for the scheme or just for funding acquisition (or both) should be clarified.

PARA 16

We would suggest that there should be more emphasis here on encouraging negotiation prior to seeking compulsory powers and throughout the process. Acquiring Authorities should be expected to provide evidence that meaningful attempts at negotiation have been pursued or at least genuinely attempted, save for lands where land ownership is unknown or in question.

We would also propose that the fifth bullet point be extended to make reference to offering advice and assistance to affected occupiers in respect of their relocation.

PARA 18

A further bullet point could be added as follows:

"Where appropriate, give consideration to funding landowners' reasonable costs of negotiation or other costs and expenses likely to be incurred in advance of the process of acquisition".

PARA 22

The last sentence should be deleted. It is too dismissive and may discourage legitimate objection. Inclusion of land within a development plan allocation does not mean that all of the area so designated is **required** for the ensuing scheme or imply that its compulsory purchase is justified.

PARA 27

Typo at end of second paragraph - "know" should be "known".

PARA 30

This paragraph demonstrates the shortcomings of the Q&A style of the guidance as the answer given is much wider than is implied by the question.

PARA 32

This should place a greater onus on the AA to respond to objections; the last sentence should be amended to read:

The acquiring authority's statement of case should **set out a detailed response** to the objections made to the compulsory purchase order".

PARA 65

This suggests S226 CPOs cannot be made if the scheme is not in the Authority's Local Plan. S226 is not so restricting and many schemes not in the Plan would be capable of meeting the relevant tests for the use of the powers.

PARA 68

It could be useful for this paragraph to make it clear that the powers under S226 (3)(a) can be used in conjunction with either of the powers under (1)(a) or (1)(b).

PARA 69

This may need re-wording in regard to it being "immaterial" who is taking the proposed scheme forward. It may help to explain that "immaterial in S226 (4) does not mean that issues such as developer track record, credibility and funding are not relevant in considering the compelling case for expropriation, but just that it need not be the Acquiring Authority constructing the underlying scheme.

It may be a better approach to amend the question to read along the lines of "Can the powers in section 226(1) or 226(3)(a) be used only if the purpose or activity specified in the Order is to be taken forward by the Authority itself?

PARAS 146. 150, 171, 237

Reference to English Heritage needs to change to Historic England.

PARA 154

We recommend the Circular state that the AA set out in the SOR what steps it has taken to negotiate for the acquisition by agreement the land.

Acquiring Authorities are advised at paragraph 159 to think about inclusion of the minerals code. We suggest it is a good idea to ask Acquiring Authorities to mention their reasoning in the Statement of Reasons if it is relevant.

PARA 162

Is the first sentence needed? If a local authority own land with a title impediment which prevents sale, why can it not be used? Is this a hint about developers asking Local Authorities to make a CPO to overcome right to light issues?

PARA 163

Whilst this sets out the law, should the Circular also advise Acquiring Authorities to also include potential Part 1 claimants to ensure some consistency with DCOs? As it is not a legal requirement, it could simply be those people the Acquiring Authorities think may have a claim?

PARA 165

This advice is not helpful. We suggest that when seeking information from the partnership, the Acquiring Authorities asks them to nominate a person for service. Not all the partners will own the land and a CPO schedule would look odd with hundreds of partners' names on it, as may be the case for some partnerships.

PARA 166

Could the advice also make the point that a copy of the details should be sent to the actual contact who has been dealing with negotiations. It is frequently the case that in big corporations notices can take weeks to filter down to the right person and the ability to object may be lost. It is good practice to provide copy notices to contacts known to acquiring authorities.

PARA 175

The wording in the first bullet has appeared in earlier circulars and predates the amendments to procedures which now include table 2. Accordingly, if an order were promoted to extinguish an easement, the person with the benefit of it would appear in table 2. Thus the option of simply referring to it in the Statement of Reasons is wrong. However the Statement of Reasons needs to address the reasons for its inclusion in the Order.

The sentence beginning “An order may" is ambiguous as to what it means. Also, existing easements and restrictive covenants can be acquired/extinguished and new easements/restrictive covenants can be acquired through the order. Guidance on this could be included in the Circular here

PARA 177

More advice should be offered based on the judges' advice, which is now historic and does not take into account the significant advances in land registration and land referencing technology generally. For instance, Acquiring Authorities should be encouraged to serve formal notices seeking information on all interests they have identified to find out if there any additional interests they are not aware of. Guidance can be issued to say that if a landowner has been served with a notice and fails to respond or does not identify an interest the Acquiring Authority will normally have discharged its duty to make diligent inquiry and the person who has failed to reply or disclose an interest may have to answer to that interest if it is subsequently prejudiced.

PARA 211

More advice could be provided here along with some examples of the wording for rights, as can be found in the highway circular 2/97.

This is where the imposition of restrictive covenants could be dealt with and in particular how they may apply on such as pipelines and underground or overhead cables where a covenant may be imposed on land alongside the pipe in different ownership and advice could say how this is to be justified and that the extent of any restriction must be justified.

PARA 226

The question implies that a CAAD should only be applied for when "required" but there is no such limitation in the Act; the s17 route is there as one of the tools which a claimant or AA can use if they feel this would assist in the valuation of the land.

The circumstances when a certificate might be "required" have been carried across from 06/04 but are of reduced relevance now that a CAAD is likely to include much more that a list of uses for which planning permission would have been granted. A site can have an allocation in an adopted development plan but it may still be desirable to seek a CAAD in order to establish the quantum of development that would have been approved and what if any S106 obligations or other development requirements would need to be taken account of in valuing the land. Also the three sets of circumstances as set out are too narrow to reflect the reality of today's development plan system; we currently have a large number of adopted plans which do not include any site specific allocations.

PARA 227

Although para 227 states that the right to make such an application arises at the launch date the prospects of securing planning permission have to be assessed as at the valuation date which will not be known if the s17 application is made in advance of the GVD or NTT being served we are aware of one case where the landowner has effectively been prevented from making an application for a CAAD because the confirmed CPO has not yet been implemented and the AA refused to agree a date at which the planning prospects should be assessed. This needs to be resolved either in the guidance of through a further amendment to the LCA 1961.

PARA 229

If the CAAD system is to operate effectively in the future it is critical that the guidance should be as explicit as possible both as to the level of information that should be provided by the applicant and the manner in which the LPA should consider the application and reach a decision on it. This lack of understanding on both sides has conspired in the past to reduce the perceived value of a CAAD and hence to discourage their use. The revised guidance goes some way to achieving greater clarity but could be further improved. The following amendments to the draft text of para. 229 is proposed:

In an application under section 17 [link], the applicant may seek a certificate to the effect that there either is t any development that is appropriate alternative development for the purposes of section 14 (a positive certificate) or that there is no such development (a nil certificate)

. If the application is for a positive certificate the applicant must specify each description of development that he considers that permission would have been granted for and his reasons for holding that opinion. The onus is therefore on the applicant to substantiate the reasons why he considers that there is development that is appropriate alternative development.

Acquiring authorities applying for a 'nil' certificate must set out the full reasons why they consider that there is no appropriate alternative development in respect of the subject land or property.
The phrase "description of development" is intended to include the type and form of development. Section 17(3)(b) requires the descriptions of development to be "specified", which requires a degree of precision in the description of development.

The purpose of a certificate is to assist in the assessment of the open market value of the land. Applicants should therefore consider carefully for what descriptions of development they wish to apply for certificates. There is therefore no practical benefit to be gained from making applications in respect of descriptions of development which do not maximise the value of the land. Applicants should focus on the description or descriptions of development which will most assist in determining the open market value of the land

An application under section 17 is not a planning application and applicants do not need to provide the kind of detailed information which would normally be submitted with a planning application. However it is in applicants' interests to give as specific a description of development as possible in the circumstances, in order to ensure that any certificate granted is of practical assistance in the valuation exercise.
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However applicants should normally set out a clear explanation of the type and scale of development that is sought in the certificate and a clear justication for this. This could be set out in a form of planning statement which might usefully cover the following matters:

- Confirmation of the valuation date at which the prospects of securing planning permission need to be assessed;
- the type or range of uses that it considers should be included in the certificate including uses to be included in any mixed use development which is envisaged as being included in the certificate;
- where appropriate, an indication of the quantum and/or density of development envisaged with each category of land.
- where appropriate an indication of the extent of built envelope of the development which would be required to accommodate the quantum of development envisaged.
- a description of the main constraints on development which could be influenced by a planning permission and affect the value of the land, including matters on site such as ecological resources or contamination, and matters off site such as the existing character of the surrounding area and development.
- An indication of the what planning conditions or planning obligations the applicant considers would have been attached to any planning permission granted for such a development had an planning application be made at the valuation date;

A clear justification for its view that such a permission would have been forthcoming having regard to the planning policies and guidance in place at the relevant date; the location, setting and character of the site or property concerned; the planning history of the site and any other matters it considers relevant. Detailed plans are not required in connection with a section 17 application but drawings or other illustrative material may be of assistance in indicating assumed access arrangements and site layout and in indicating the scale and massing of the assumed built envelope. An indication of building heights and assumed method of construction may also assist the Local Planning Authority in considering whether planning permission would have been granted at the relevant date.

PARA 230

An additional paragraph is proposed to provide guidance to Local Planning Authorities and the Upper Tribunal in respect of the consideration of an application made under s17. This could be added following the text which includes the link to section 17(6) and could read on the following lines:

"Local Planning Authorities should note that an application made under s17 is not a planning application and does not require the same level of assessment that would be given to the consideration of a planning application. The LPA should 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. As the development included in the certificate is not intended to be built the LPA does not need to concern itself with whether or not the granting of a certificate would create any precedent for the determination of future planning applications".

PARA 232

The following sentence should be added to the existing text:

Applicants seeking a s17 Certificate should seek their own planning advice is this is felt to be required in framing their application.

PARA 233

The address for the Tribunal needs updating to:

Upper Tribunal (Lands Chamber)
5th floor, Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Additional Comment

The guidance in respect of Section 17 certificates as drafted does not include any reference to the fact that the development envisaged within the application can be either of the subject land in isolation or in conjunction with other adjoining land although the resulting certificate should apply only to the subject lands. This can be an area of confusion both for applicants and for local planning authorities and it would be helpful for the revised guidance both to explain this option and how such an application should be presented and determined. The CPA would be happy to suggest the possible wording for this part of the guidance if the DCLG consider that this should be included.