The Scottish CPA Conference 2014

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Welcome and Introduction

Archie Rintoul

Scottish CPA Chairman; Chief Valuer, VOA Scotland

The Scottish Law Commission project on CPO Reform

Patrick Layden QC TD

Commissioner, Scottish Law Commission

Scottish Law Commission Compulsory Purchase Project

- Discussion Paper essentially about legislation: - Acts in 1845, 1919, 1947, 1963, 1973, 1997
- Additions, alterations, glosses, discards, but nothing has been thrown away: - nothing has been repealed

Compulsory Purchase

P J LAYDEN QC TD

Scottish Law Commission
promoting law reform

Scottish Law Commission Compulsory Purchase Project

- Discussion Paper essentially about legislation: - Acts in 1845, 1919, 1947, 1963, 1973, 1997
- Additions, alterations, glosses, discards, but nothing has been thrown away: - nothing has been repealed

Compulsory Purchase in practice

- 2009-2012 – Local Authority activity
  - CPOs requested: 23
  - CPOs confirmed: 27
- Private Acts
  - 2004-2014 - 10

Discussion Paper -

- Part I – Introduction
  - Introduction
  - General Issues
  - Current Legislation
- Part II – Procedure
  - Procedure for obtaining CPO
  - Implementation of CPO
  - Conveyancing issues

Discussion Paper - continued

- Part III - Compensation
  - General
  - The 6 Rules
  - Rule 3, Pointe Gourde and the Scheme
  - Establishing Development Values
  - Retained Land
  - Further compensation issues
  - Resolution of Disputes

Discussion Paper

- Part IV – Conclusion
  - Miscellaneous issues
  - Summary and conclusion

Subjects not covered

- Justification for Compulsory Purchase
- Statutory Wayleaves
- Special Parliamentary and private bill procedures
- Land swaps, Crichel Down
- Blight
- Injurious affection where no land taken
- Claims under Part 1 of the 1973 Act

Compensation, Parliament and the Courts

- Initial Structure – individual authorising Act followed by procedure set out in 1845 Act
- Courts and compensation juries misinterpreted 1845 Act
- Too generous an interpretation of "the value to the owner"

Lucas, [1909] 1 K.B. 16

"There is, therefore, nothing unreasonable in considering that in certain cases land specially suitable for such purposes [construction of a reservoir] might fairly become in private hands the subject of competition between rival public authorities desirous of getting the advantage of that special suitability; and -------the tribunal assessing the compensation would be---- bound to consider what is the fair market value so arising" Fletcher Moulton LJ at p. 32

Scott Committee - 1918 Cd 9229

- "We are of opinion that the Lands Clauses Acts are out of date, and fail to give effect to the requirements of the community of to-day, and therefore that they should be repealed and replaced by a fresh Code" (Paragraph 6)

Scott Committee

- "There is no provision in the Lands Clauses Acts for any addition to the compensation in respect of the fact that the land has been compulsorily acquired. But in practice a percentage is invariably added to, or included in, the price of the land." (Paragraph 9)
- E/W & Sc – 10%;
- Sc (agricultural) – 100%

Scott Committee

- "The standard of the value to be paid to the owner is to be **the market value as between a willing seller and a willing buyer**; though----the owner should, of course, in addition, receive fair compensation for consequential injury"

1963 Act (1919 Act) – 6 Rules Rules 1-2

- (1) No allowance shall be made on account of the acquisition being compulsory:
- (2) The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise:

Rules 3 and 4

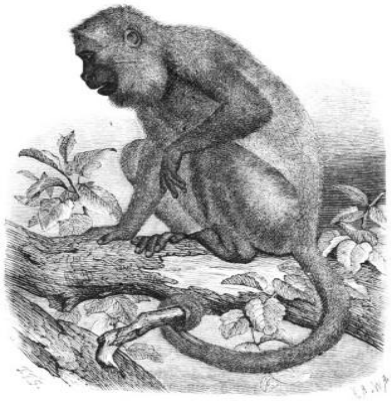
- (3) **The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose** to which it could be applied only in pursuance of statutory powers, or **for which there is no market apart from [...][1] the requirements of any authority possessing compulsory purchase powers**:
- (4) Where the value of the land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the occupants of the premises or to the public health, the amount of that increase shall not be taken into account:

Rules 5 and 6

- (5) Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the official arbiter is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement:
- (6) The provisions of rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land:

Pointe Gourde Quarrying and Transport Company v Sub-Intendent of Crown Lands 1947 A.C. 565

- US/UK agreement in WWII
- US Naval base at Chaguaramas in Trinidad
- Acquired 2 parcels of land:
  - Land for base
  - Functioning quarry for limestone
- Compensation for quarry reflected its current profits
- **Also reflected increased use for building of Naval base**



Judicial Committee of Privy Council (3 Judges – extempore judgment)

- Held that extra payment not caught by Rule 3
- But:
- "It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition." (Lord MacDermott at p. 572)

Post WWII legislation

- Town and Country Planning Act 1947
  - Value restricted to current use value
  - No allowance for development value
- Town and Country Planning Act 1959
  - Development value allowed
  - Attempt to give statutory effect to PG decision
- Consolidated -1961 (E/W); 1963 (Sc)

Disregarding the scheme

- Act attempted to adapt PG principle for post WWII system
- Provided that increase in value because of scheme on other land should be disregarded: but
- Increase in value because of scheme on owner's land could be taken into account.

Davy v Leeds Corporation (1965) 16 P. & C.R. 24 (CA)

- "To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a slough of despond through which the court would never drag its feet, but I have, by leaping from tussock to tussock as best I might, eventually pale and exhausted, reached the other side where I find myself, I am glad to say, at the same point as that arrived at with more agility by my Lord."
- (Harman LJ, at p. 31)

Myers v Milton Keynes Development Corporation (1974) 27 P. & C.R. 518

- "It is apparent, therefore, that the valuation has to be done in an imaginary state of affairs in which there is no scheme. The valuer must cast aside his knowledge of what has in fact happened in the past eight years due to the scheme. He must ignore the developments which will in all probability take place in the future ten years owing to the scheme. Instead, he must let his imagination take flight to the clouds." (Lord Denning MR at p. 527)

Waters v WDA [2004] UKHL 19

- "51.-----It is frankly impossible to believe that Parliament intended that enhancement of value attributable to the prospect of development of associated land should be disregarded but not enhancement in value attributable to the prospect of development of the subject land itself."
- "53.------[T]here is at least one further gaping lacuna in the code. This is illustrated by Wilson v Liverpool Corporation [1971] 1 WLR 302 , where an authority acquired some of the land needed for a scheme of development by agreement and made a compulsory purchase order in respect of the remainder. Enhancement in value of the subject land attributable to the development of the land bought by agreement would be outside case 1. Here again, that cannot have been intended by Parliament."

Waters - continued

- "54. The courts therefore found themselves driven to conclude that the statutory code is not exhaustive and that the Pointe Gourde principle still applies. **This conclusion is open to the criticism that in many instances this makes the statutory provisions otiose. This is so, but this is less repugnant as an interpretation of the Act than the alternative."**

Waters - conclusions

- (1) The Pointe Gourde principle should not be pressed too far. The principle is soundly based but it should be applied in a manner which achieves a fair and reasonable result. Otherwise the principle would thwart, rather than advance, the intention of Parliament.
- (2) A result is not fair and reasonable where it requires a valuation exercise which is unreal or virtually impossible.
- (3) A valuation result should be viewed with caution when it would lead to a gross disparity between the amount of compensation payable and the market values of comparable adjoining properties which are not being acquired.

Waters

- "(4) When applied as a supplement to the section 6 code, which will usually be the position, the Pointe Gourde principle should be applied by analogy with the provisions of the statutory code. Thus in the class 1 type of case the area of the scheme should be interpreted narrowly, for instance, so as to embrace the property acquired under the compulsory purchase order and property which would probably have been so acquired had it not been bought by agreement. In other cases, such as case 2, Parliament has spread the 'disregard' net more widely. Then it may be appropriate to give the scheme a wider scope."

Waters

- (5) Normally the scope of the intended works and their purpose will appear from the formal resolutions or documents of the acquiring authority. But this formulation should not be regarded as conclusive.
- (6) When in doubt a scheme should be identified in narrower rather than broader terms.

Conclusions

- Parliament has failed to make it clear that the legislative provisions are comprehensive
- The courts have filled the gap with an unsatisfactorily imprecise set of guidelines
- Anyone trying to find out the law would be confused
- Anticipate that the SLC will wish to consult on draft legislation in due course.

Disputes – Lands Tribunal for Scotland

The Hon Lord McGhie,
President, Lands Tribunal for Scotland

Andrew Oswald FRICS,
Member, Lands Tribunal for Scotland

Case Law Update

James Findlay QC,
Terra Firma Chambers

Alasdair Sutherland,
Terra Firma Chambers

terra firma CHAMBERS

CASE LAW UPDATE

Part 1

ELECTRICITY ACT MATTERS, WITH PARTICULAR REFERENCE TO WAYLEAVES

Part 2

OTHER RECENT CASE LAW

EA 1989 Schedule 3

- Schedule 3 deals with compulsory acquisition of land etc by licence holders. It is a broad power:-

  1(1) Subject to paragraph 2 below, the Secretary of State may authorise a licence holder to purchase compulsorily any land required for any purpose connected with the carrying on of the activities which he is authorised by his licence to carry on.

- Paragraph 2 provides for procedure, note the requirement in (2)(b) as to planning consent/use within 5 years and the need to act swiftly after any consent granted.
- Part III has specific application to Scottish provisions.

Ramac Holdings Ltd v KCC

[2014] UKUT 0109 (LC)

•Purchase of part of a landholding (road widening).

"Insofar as the claimant suffers a loss because of a diminution in the value of retained land then this will form a claim for compensation for severance and/or injurious affection. It does not justify adopting an artificial approach to valuing the reference land as if is still formed part of a larger whole."

EA 1989 Schedule 4

- Paragraph 6 deals with the acquisition of wayleaves, and applies to both England and Scotland.
- In effect if necessary and expedient to install or keep an electric line provision is made for the grant of "necessary wayleaves".

  "the necessary wayleave" means consent for the licence holder to instal and keep installed the electric line on, under or over the land and to have access to the land for the purpose of inspecting, maintaining, adjusting, repairing, altering, replacing or removing the electric line.

  The land owner has a right to be heard in opposition.

UK ELECTRICITY ACT CASES

- *National Grid Electricty Transmission Plc V Anthony White Estate Limited* [2014] EWCA Civ 216 & [2013] UKUT 005 (LC)
- Wayleave – claim for compensation under paragraph 7 of Shedule 4 to the EA 1989 in respect of wayleave granted to NGET plc to retain a 400 KW line across land. Claim £5.8M. By time of grant, owner had agreed to sell.
- Single question on appeal was whether the amount of compensation should be measured by reference to price payable under conditional contract of sale or open market development value.

NGET v White

- Schedule 4 EA1989 makes bespoke provision for compensation.
- Common ground apply principle of equivalence in *Horn v Sunderland* and *Shun Fung Ironworks* cases.
- Tribunal considered that fair compensation in respect of the grant was the loss of the price payable under the contract. Appellant argued that it was a purely personal loss outside the scope of paragraph 7, Sched 4 and that compensation only concerned actual effect of the wayleave on the land itself therefore diminution in market value only recoverable. Relied upon CPO cases.
- Court found such cases unhelpful.

NGET v White

- CA held:-
  - Contractual losses recoverable. Para 7 in most general terms.
  - Only limitation is that loss must be suffered by claimant in his capacity as owner or occupier of land.
  - No need to show effect upon the land itself by the wayleave.
  - Value to the owner of the land is what is important.
  - No evidence of sham in contract , it was justified for commercial reasons.

Stynes v Western Power

- *Neville James Stynes & Ano v Western Power (East Midlands) Plc* [2014] RVR 15
- A necessary wayleave acquired under paragraph 6 of Schedule 4 is not an easement, or any form of interest in or right over land. Distinction between Schedule 3 and 4 noted.
- Claim under EA 1989 Sch 4 para 7 could not be made in respect of neighboring land to that owned by the owner.
- No general injurious affection claim. "… the words "compensation in respect of the grant" in paragraph 7(1)? In our view Mr Elvin was right to submit that these words serve to confine the availability of compensation under paragraph 7(1) to loss that is specifically attributable to the grant of the wayleave, and only that."

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BRIKKEN WASTE V NIE

- *Brikklen Waste Ltd v Northern Ireland Electricity (2014)* 06.02.2014.
- Para 11 of Sched 4 of the Electricity (Northern Ireland) Order 1992 deals with compensation for wayleaves in very similar terms to corresponding EA provisions.
- Reached the same conclusion, relying upon earlier cases in the LT and, indeed, the earlier case of *Brown Construction Ltd v SP Transmission Ltd* (LTS/COMP/2002/2).

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Part 2 – other recent case law

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Part 2 – other recent case law

- Riva v Edinburgh Airport Limited
- Network Rail (Infrastructure) Ltd v Scottish Ministers
- Emslie v Scottish Ministers

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Riva v Edinburgh Airport Limited

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Riva v Edinburgh Airport Limited

- Three things:

1. Formal validity of the blight notice
2. Applicant's reasonable endeavors to sell
3. Price at which interest might have been expected to sell

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Network Rail (Infrastructure) Ltd v Scottish Ministers


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Network Rail (Infrastructure) Ltd v Scottish Ministers

- Three things:

1. Strict application of CAAD regs
2. Mannai and the "reasonable recipient"
3. www ≠ furnishing

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Emslie v Scottish Ministers


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Emslie v Scottish Ministers

- Three things:

1. Use of the land: right here, right now
2. Use by someone, to some extent
3. Imparting an agricultural character

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Lunch

Hot fork buffet
·Navarin of Scotch lamb with sautéed potatoes
·Lentil, chickpeas and sweet potato stewed in a rich madras sauce with rice. (v)
·Farmhouse breads
·Chefs choice of vegetables

Desserts:
·Red fruit salad with strawberry coulis
·Chocolate pot

Is there anything we can steal from English legislation and procedure

Jeremy Pike
Barrister, Francis Taylor Building

Francis Taylor Building

Is there anything Scotland can steal from English CPO legislation and procedure?

Jeremy Pike
(Barrister – England & Wales)

June 2014

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"The law of compulsory purchase is generally considered to be antiquated and obscure. Much of it is still contained in the Lands Clauses (Consolidation) (Scotland) Act 1845. The law at present is broadly similar to the law in England and Wales. In its work on this area,[10] the Law Commission for England and Wales found that almost two thirds of owners were either dissatisfied or very dissatisfied with the compulsory purchase process, and that broadly the same proportion found the process stressful. They also found that the process at present can take from two to seven years to complete, and generates uncertainty and financial loss for those involved. Our impression is that much the same is true north of the border."

(Scottish Law Commission no 220; *Eighth Programme of Law Reform*; December 2009)

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"This area of the law exhibits, in an extreme way, the defects of many parts of our substantive law. It has moved forward by fits and starts over decades or centuries, accumulating assorted debris on the way, and pushed occasionally in one direction or another by opposing political forces. The result may be seen as an archetypal case of what the Law Commission is for. Every one of the functions enumerated in our Act will be needed: systematic reform, codification, elimination of anomalies, repeal of the obsolete, reduction of numbers of statutes, and general simplification and modernisation."

Sir Robert Carnwath '*Compulsory Purchase—A Model for Law Reform?*' [2000] JPL 48

(Then Chairman of the Law Commission for England and Wales; now Lord Carnwath JSC)

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The current Circular in England and Wales is Circular 06/2004 'Compulsory Purchase and the Crichel Down Rules' (last updated in 2011).

- not as recent as Scottish Planning Circular 06/2011

It is likely that the E&W Circular will be replaced in the near future – CPA England is in discussion with the Westminster government.

Strong view in England &Wales is that updating the Circular is preferable to reform of CPO law though new legislation, at the present time.

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There seems to be little appetite in England & Wales for fundamental reform/codification of CPO legislation.

The Carnwath Review, carried out in 2010, did not go so far as to recommend codification of CPO legislation.

Many of the more modest reforms proposed by Carnwath (Law Commission No 291 – '*Towards a Compulsory Purchase Code: (2) Procedure*'; Dec 2004) were not taken forward.

Some of Carnwath's proposed reforms may be as appropriate in Scotland as in England.

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Principal CPO legislation in E&W:

- *Land Compensation Act 1961*
- *Compulsory Purchase Act 1965*
- *Land Compensation Act 1973*
- *Acquisition of Land Act 1981*

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Although the E&W legislation is generally younger than the equivalent Scottish legislation, it is still something of a papertrail. The current state of the E&W legislation could not be called a 'model' for future reform in Scotland.

Nor could the labyrinthine body of legislation and case law pertaining to compensation for compulsory purchase and disturbance, which appears to be in many important respects shared between E&W and Scotland.

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Some areas of interest:

1. Powers enabling Compulsory Purchase
- inc. "community assets" in E&W

2. Justification for confirmation of a CPO

3. Nationally Significant Infrastructure Proposals – the 'Development Consent Order' regime

4. Recent practical proposals for reform of compulsory purchase law in E&W

5. Recent minor amendment to CPO procedure in E&W

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1. Powers enabling compulsory purchase

A comparison between the powers available to public bodies and statutory undertakers in Scotland, and England, reveals considerable similarity in scope.

One area where they may be a subtle but important difference is in the general Planning Act enabling power.

- Town and Country Planning (Scotland) Act 1997, section 189

-Town and Country Planning Act 1990 section 226

(Both amended by the Planning and Compulsory Purchase Act 2004)

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Town and Country Planning (Scotland) Act 1997, section 189:

(1) A local authority shall, on being authorised to do so …, have power to acquire compulsorily any land in their area which—

(a) is suitable for and is required in order to secure the carrying out of development, redevelopment or improvement;

(b) is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.

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(2) in considering for the purposes of subsection (1)(a) whether land is suitable for development, redevelopment or improvement [the acquiring authority] shall have regard to—

(a) the provisions of the development plan, so far as material,

(b) whether planning permission for any development on the land is in force, and

(c) any other considerations which would be material for the purpose of determining an application for planning permission for development on the land.

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Town and Country Planning Act 1990, section 226

(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area

(a)if the authority think that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land; or

(b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.

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(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, re-development or improvement is likely to contribute to the achievement of any one or more of the following objects–

(a) the promotion or improvement of the economic well-being of their area;

(b) the promotion or improvement of the social well-being of their area;

(c) the promotion or improvement of the environmental well-being of their area.

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The Powers in section 226 (E&W) appear more broad, and may be available in a wider range of circumstances.

Circular 06/2004 (E&W) Appx A:

These powers are expressed in wide terms and can therefore be used by such authorities to assemble land for regeneration and other schemes where the range of activities or purposes proposed mean that no other single specific compulsory purchase power would be appropriate.

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Circular 06/2011:

22. A planning authority has compulsory purchase powers that it may use to assemble land where this is necessary to carry out the proposals in its development plan or other strategic planning documents. It can use these powers to assemble land for regeneration and other schemes where the range of activities it proposes means that no other single specific compulsory purchase power would be appropriate. It can also use them to provide infrastructure and/or assemble and prepare sites to make them available for the private sector to develop or to acquire an individual property that needs redevelopment or improvement, such as a derelict or abandoned property or empty home.

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Report of the Land Reform Review Group May 2014

Section 8

The Review Group's view is that the capacity of the Scottish Government and local authorities to acquire land in the public interest should also be enhanced by giving them a right to register a pre-emptive right to buy land. Legislation in 2003 gave this type of statutory right of pre-emption, when land is sold, to appropriate local community bodies and to agricultural tenants with secure 1991 tenancies as discussed in Sections 17 and 28 respectively. The Group considers that the Scottish Government and local authorities should have such a right too.The Group anticipates that such a right might be particularly valuable to local authorities.

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For example, there may be situations where there is a public interest in acquiring an area of land that would not warrant using a CPO, but which the local authority might not want to miss the chance to buy if the land came up for sale. In such situations, rather than applying for a CPO, a local authority would apply to register a right of pre-emption over the land.

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Assets of community value (E&W)

The Localism Act 2011 provides for a scheme called 'assets of community value', which requires a local council to maintain a list of 'community assets'.

Nominations for community assets can be made by parish councils or by groups with a connection with the community. Individuals cannot nominate community assets.

The right to bid only applies when an owner decides to dispose of an asset; there is no compulsion to sell it. The scheme does not give first refusal to the community group (unlike the equivalent scheme in Scotland).

Certain types of land (esp. residential property) are exempt. Owners of property placed on the register may appeal against its listing and can claim compensation if they can demonstrate its value has been reduced.

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Localism Act 2011, section 88

(1) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area is land of community value if in the opinion of the authority—

(a) an actual current use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community, and

(b) it is realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community.

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(2) For the purposes of this Chapter but subject to regulations under subsection (3), a building or other land in a local authority's area that is not land of community value as a result of subsection (1) is land of community value if in the opinion of the local authority—

(a) there is a time in the recent past when an actual use of the building or other land that was not an ancillary use furthered the social wellbeing or interests of the local community, and

(b) it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

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E&W Circular 06/2004 - Appx KA (updated 2011)

1. From time to time, authorities may receive requests from the community … to acquire community assets that are in danger of being lost to the detriment of that community. If the owner is unwilling to sell, the implication is that the community would ask the authority to use its compulsory purchase powers to acquire the asset.

2. 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.

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3. As with any compulsory purchase, local authorities must be able to finance the cost of the scheme (including the compensation to the owner) and the Compulsory Purchase Order process either from their own resources, or with a partial or full contribution from the requesting organisation (see paragraphs 20 – 23 of Part 1 of the Memorandum to this Circular).

4. In order to assess whether there is a compelling case in the public interest for compulsory acquisition, local authorities should ask those making the request for such information that is necessary for them to do so. This could include the value of the asset to the community; the perceived threat to the asset; the future use of the asset and who would manage it (including a business plan where appropriate); any planning issues; and how the acquisition would be financed. This list is not exhaustive, but the level of detail required should be tailored to the circumstances

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2. Justification for confirming a CPO

-CPO requires enabling power (e.g. Planning Act power, Housing Act power)

- Acquisition of Land Act 1981 (E&W) sets out, principally, the procedure for submission to and confirmation of CPO by confirming authority

- the "test" for confirmation is found, not in primary legislation, but in E&W Circular 06/2004

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Circular 06/2004:

"*17. A compulsory purchase order should only be made where there is* ***a compelling case in the public interest****. An acquiring authority should be sure that the purposes for which it is making a compulsory purchase order sufficiently justify interfering with the human rights of those with an interest in the land affected. Regard should be had, in particular, to the provisions of Article 1 of the First Protocol to the European Convention on Human Rights and, in the case of a dwelling, Article 8 of the Convention.*

18. The confirming Minister has to be able to take a balanced view between the intentions of the acquiring authority and the concerns of those whose interest in land it is proposed to acquire compulsorily. The more comprehensive the justification which the acquiring authority can present, the stronger its case is likely to be. But ***each case has to be considered on its own merits*** *and the advice in this Part is not intended to imply that the confirming Minister will require any particular degree of justification for any specific order.* ***Nor will a confirming Minister make any general presumption that, in order to show that there is a compelling case in the public interest, an acquiring authority must be able to demonstrate that the land is required immediately in order to secure the purpose for which it is to be acquired****."*

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"*19. If an acquiring authority does not have a clear idea of how it intends to use the land which it is proposing to acquire, and cannot show that all the necessary resources are likely to be available to achieve that end within a reasonable time-scale, it will be difficult to show conclusively that the compulsory acquisition of the land included in the order is justified in the public interest, at any rate at the time of its making. 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****. The Human Rights Act reinforces that basic requirement."*

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3. Nationally Significant Infrastructure Proposals – the 'Development Consent Order' (DCO) regime

Planning Act 2008 (E&W)

-Regime exists alongside Transport and Works Act Orders (equivalent of TAWS in Scotland)
- purpose is to provide a range of powers and rights to an undertaker, for purpose of 'Nationally Significant Infrastructure Proposal
- covers not only rail schemes and navigation works*, but also power stations, large renewables schemes, roads, national grid infrastructure, gas storage, reservoirs, airports, and so on
- in future will include large commercial/mixed-use projects

*some rail schemes remain in the T&WA Order regime; most schemes now fall into the Planning Act 2008 regime

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A DCO is a statutory instrument, when confirmed

Compulsory Purchase Powers available:

-including the ability to acquire rights as well as land

-possibly including the acquisition of a negative right akin to a restriction or restrictive covenant

- including the right to occupy land temporarily (for access, temporary construction works etc) but not acquire outright

-Planning Act 2008 (Section 122(3)) enshrines in law the "*compelling case in the public interest*" test (otherwise merely an expression of government policy)

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Planning Act 2008 section 122(2) requires that the land to be acquired:

-(a) is required for the development to which the development consent relates,

-(b) is required to facilitate or is incidental to that development, or

-(c) is replacement land which is to be given in exchange for the order land [i.e. in exchange for open space, common land etc]

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For (b), the Secretary of State's guidance on associated development (April 2013) states:

"an example might be the acquisition of land for the purposes of landscaping the project. In this example, the decision- maker should be satisfied that the development could only be landscaped to a satisfactory standard if the land in question were to be compulsorily acquired, that the land to be taken is no more than is reasonably necessary for that purpose and is proportionate"

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A DCO can also authorise "associated development" (Planning Act 2008 section 115), which is associated with but not part of the Nationally Significant Infrastructure itself, and which may not include a dwellinghouse.

Land can be acquired, by compulsory purchase, for "associated development".

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Secretary of State guidance states that "associated development"

- Must have a direct relationship with the principal development. Associated development should therefore either support the construction or operation of the principal development, or help address its impacts.
- Associated development should not be an aim in itself but should be subordinate to the principal development.
- Development should not be treated as associated development if it is **only** necessary as a source of additional revenue for the applicant, in order to cross-subsidise the cost of the principal development. This does not mean that the applicant cannot cross-subsidise.
- Associated development should be proportionate to the nature and scale of the principal development.

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R (on the application of Innovia Cellophane Ltd) v Infrastructure Planning Commission [2011] EWHC 2883 (Admin)

The E&W High Court held that the "dwellings" exclusion did not preclude a proposal involving temporary accommodation for workers, for the new proposed Hinkley Point C nuclear reactor. The temporary accommodation would be sited on land that was to be acquired by compulsory purchase. In principle, therefore, temporary accommodation for workers engaged in the construction or operation of infrastructure may be regarded as associated development.

The Hinkley Point C proposal also included, as "associated development", the erected of a jetty to enable deliver of construction material by boat.

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4. Proposals for reform of Compulsory Purchase law (these are some of the proposals being taken forward by CPA England)

Powers of temporary possession – a real practical need for this power

Proposal: (change to Acquisition of Land Act 1981) to allow acquiring authorities to have a general power of temporary possession powers for all land within order limits; compensation for occupation/disturbance would be paid.

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Quaere: should such powers, if available, apply to all land; only to land over which new rights are also sought; or only land specifically identified in the Order?

Should vesting or notices to treat/enter be used later acquire land over which temporary possession has been taken?

The timetable for possession – should it be limited in time (say, 12 months) or limited by reference to when the acquiring authority no longer needs possession i.e. the acquiring authority must vacate after 12 months following cessation of works on the land.

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Notice before taking entry

Occupiers only have a minimum of 14 days to relocate on service of a notice to treat and entry and 28 days certainty on a general vesting declaration.

This is often inadequate to relocate a business. On the other hand, extending these periods materially increases risk of new interests coming to light before entry.

The quality of data used to prepare the notices relies in responses from third parties and if inaccuracies discovered the day before possession then it doubles the time required to take possession.

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Proposal:

- where Notice to Treat is served, minimum notice of entry (section 11 CPA 1965) is extended from 14 days to 3 months from date of service, unless otherwise agreed.

- for General Vesting Declaration, the execution of a GVD and immediate notification to parties should be the first step in process; acquiring authority taking possession with 3 months should be the next step.

- if, through mistake or inadvertence, the acquiring authority has omitted to serve a notice to treat/notice of execution of GVD on an occupier then, provided they have used reasonable and diligent enquiries in compiling the book of reference they can still take possession on the date the other notices expire on that property .

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"Reverse Notice of Entry"

Proposal: occupier/owner should be able to serve notice on acquiring authority to require trigger of purchase and acquisition of occupier/owner's interest. This would crystallise date of entry and to give an affected person greater certainty of when possession would be taken. It would also create certainty of valuation date.

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Recent minor amendments to compulsory purchase procedure (E&W):

(1)Written representations procedure for 'simple' objections – no public inquiry or hearing

(2) new costs rules – costs can be award to/against a party who does not appear at a public inquiry; costs can be recovered against an acquiring authority where the CPO is withdrawn

Workshops

Workshop 1 – Compensation
Keith Petrie, Consultant, FG Burnett Ltd

Workshop 2 – Conveyancing
Andrew Steven, Commissioner, Scottish Law Commission

Workshop 3 – Implementation and Procedure
Patrick Layden QC TD, Commissioner, Scottish Law Commission

Workshop 4 - Dispute resolution
Elaine Farquharson Black, Partner, Burness Paull LLP and Craig Whelton, Partner, Burness Paull LLP

Summary of workshop sessions

The Scottish CPA Conference 2014