

**Compulsory Purchase Association
Response to Technical Consultation on Compulsory Purchase
May 2016**

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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 over 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. It should be noted that this response may not represent the views of all CPA members, but is a consensus majority view reached after debate.
- 1.5 CPA remains committed to a fundamental reform and codification of the law on Compulsory Purchase, as proposed by the Law Commission in 2003/4. CPA's responses to the Technical Consultation are provided to assist the Department and to promote better CPO practice, but CPA remains of the view that a more radical approach is the better option to provide a simpler, fairer and faster procedure for compulsory purchase.
- 1.6 CPA has for several years promoted incremental change to legislation to remedy some of the inconsistencies and unfairness in the process. Some of these proposals are reflected in the Technical Consultation. Others have not been covered.
- 1.7 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.

Compulsory Purchase Association Response to Technical Consultation on Compulsory Purchase May 2016

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*Are the views expressed on this consultation an official response from an organisation you represent or your own personal views?

Organisational response

Personal views

*Please tick one box that best describes you or your organisation from the following list (If the organisations do not apply to you, then please tick N/A and enter your organisation on the next list):

Public Sector

- District / Borough Council
- Unitary Council
- County Council
- London Borough Council
- Parish or Town Council
- National Park / Broads Authority
- N/A

Other public sector (please specify):

Other

- Land Owner
- Developer / House builder
- Professional Association/ Industry representative body
- Local Enterprise Partnership
- Community Organisation
- Voluntary / Charitable Sector
- N/A

Other (if none of the options in the lists above apply to you, please specify your type of organisation here):

Section 1: Changes to compensation assessment and process

Clearer way to identify market value

Question 1: Do you agree with the proposal to codify the 'no scheme world' valuation principle in legislation?

Response:

The requirement to disregard the scheme is fundamental to many Rule 2 valuations. However, the current statutory provisions are complicated and not always fully understood by practitioners. Reform simplifying and clarifying the approach to be taken is therefore to be encouraged. Notwithstanding this, careful thought needs to be given to the full implication of changes to the current system. If new legislation is drafted without a full understanding of all the relevant issues problems may be created rather than solved.

The current statutory disregards are narrower than many practitioners believe them to be. The reform proposals are likely to extend to the breadth of what is to be disregarded and may be used by Acquiring Authorities to limit compensation. This will particularly be the case if the scheme to be disregarded encompasses a larger underlying scheme and/or transport infrastructure.

Acquiring authorities and claimants and their advisors are currently obliged to navigate a variety of statutory provisions and judicial interpretations of those provisions. While the decisions of the House of Lords in *Waters v Welsh Development Agency* (2004) and *Transport for London v Spierose* (2009) have provided some clarity, we consider that further improvements can be made.

We note the reference to the Law Commission's recommendation that its proposed Rule 13 should 'clear the decks' and supersede the 'Pointe Gourde' rule and all other statutory versions or case law relating to the definition and disregard of the scheme.

The CPA supports the repeal of the current legislation relating to definition of the scheme and its effect on the assessment of compensation. However, it believes that repeal should be limited to sections 6 and 9 of and schedule 1 to the Land Compensation Act 1961. Other existing statutory provisions that might also be said to relate to the concept of disregarding the scheme, such as sections 5(3) and 14-18 of the 1961 Act should be retained.

The principle of 'betterment recapture' provided by Section 7 of the 1961 Act should be retained. However, section 7 refers to section 6 and schedule 1 and is capable of mixed interpretation, so that it needs to be both modified and made clearer.

On numerous occasions the Tribunal and higher courts have criticised section 6 and schedule 1 in particular, which is widely considered to be archaic and extremely difficult to follow.

Notably Russell LJ in *Camrose v Basingstoke* (1966) said that the drafting of section 6 appeared to be "*calculated to postpone as long as possible comprehension of its purport.*" Lord Collins in *Spierose* referred to it as "*notoriously complex and obscure*" and Harman LJ in *Davy v Leeds Corporation* (1964) as a "*monstrous legislative morass*".

Carnwath LJ (as he was then), a judge with unrivalled expertise in this field, was moved to say at the conclusion of his impressive judgment in the Court of Appeal in *Waters* :

"The right to compensation for compulsory acquisition is a basic property right. It is unfortunate that ascertaining the rules upon which compensation is to be assessed can involve such a tortuous journey, through obscure statutes and apparently conflicting case law, as has been necessary in this case. There can be few stronger candidates on the statute book for urgent reform, or simple repeal, than section 6 of and Schedule 1 to the [Land Compensation Act 1961]".

Question 2: Do you consider that the proposal by the Law Commission (Rule 13) should be used as the basis on which to take forward amendments to the relevant legislation?

Response:

Paragraph 15(1) of the consultation document says that all previous rules, statutory or judge made, relating to disregard of 'the scheme' will cease to have effect. We would support this only to the extent that it applies to sections 6 and 9 of and schedule 1 to the Land Compensation Act, 1961.

Subject to this, we agree that paragraphs 15(1)-(4) of the consultation document are an appropriate basis for taking reform forward. Currently it is for the Tribunal to determine the extent of the scheme and we feel the added step of the acquiring authority defining what they regard as the scheme in the CPO or the documents published with it will reduce the risk of it being open to abuse.

Paragraph 15(3) implies that the extent of the statutory project will be a physical area. However, a CPO scheme is often not limited to an 'area' which can easily be drawn on a plan. The ripple effects of reduction in value can be much wider. Hence, the drafting of any bill would need to permit an acquiring authority to make the case for a wider statutory project for valuation purposes which was not solely limited to a physical area on a map.

Notwithstanding our general support, we do consider that the Government should approach the necessary legislative drafting with particular care. 13 years have passed since the Law Commission published its report and there have been significant changes in the way in which compulsory purchase powers are sought and justified.

In particular, the introduction of the development consent regime by the Planning Act 2008 renders some of the wording in the proposed Rule 13 ambiguous. The 2008 Act allows non-statutory bodies to secure compulsory acquisition powers through a development consent order. It is not clear to us that the definition of "statutory project" as "the project, for a purpose to be carried out in the exercise of a statutory function" would be easily applied.

Question 3: Do you agree that the date on which the scheme is assumed to be cancelled should be the launch date, not the valuation date as proposed by the Law Commission?

Response:

The CPA is not unanimous on this point. The views can be summarised as follows:-

Arguments for the launch date as cancellation date

The advantages are as follows: a certain consistent date known to all, applicable to all plots within a CPO, and all interests in such plots. A certain date enabling acquiring authorities to note, and collect any relevant information, changes of planning policy, development or prospect of development, that then arises subsequent to the launch date. Thus, development under the project or scheme, which may either increase or decrease the value of property to be compulsorily acquired after the launch date, would not be taken into account, whether it is beneficial or disadvantageous to either the claimant or to the acquiring authority. Thus, a regeneration scheme carried out under one compulsory purchase order, or

two or more such orders treated as one scheme, may significantly increase land values subsequent to the launch date. Using the launch date as the relevant cancellation date means that such increases in value would not be taken into account. The disadvantages of using the launch date are that events and planning policy changes between the launch date and the valuation date may have to be collected and identified in order to establish what the value of a particular property would have been had the scheme been cancelled on the launch date. That exercise may involve some reconstruction, although it is quite clear that the Tribunal is reluctant to enter into a contra-factual exercise where matters are uncertain: see *Hanbury-Tenison v Monmouthshire County Council* [2014] UKUT 0531 (LC).
Arguments for the valuation date as cancellation date.

The main argument for the launch date is that you can have different valuation dates for different interests in the same property and this leads to confusion. Those advocating the valuation date do not think this occurs often and where it does it is not a material problem in practice. When exercising compulsory purchase powers it is usual to exercise those powers over all interests at the same time. The amendments to the material detriment provisions in the Planning and Housing Bill further restrict the circumstance in which you can have different valuation dates.

The two main reasons for adopting the valuation date are:

- a) There will be years between the Launch date and the Valuation date. This may lead to significant dispute or speculation as to what may or may not have happened after cancellation of the scheme and up to the valuation date (e.g. planning, deterioration, vandalism, letting etc.). There is a risk of it leading to the situation criticised by Lord Denning in *Myers v Milton Keynes Development Corporation* and later by the president of the Tribunal in *Pentrehobyn*

MYERS v. MILTON KEYNES DEVELOPMENT CORPORATION

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 10 years owing to the scheme. Instead, he must let his imagination take flight to the clouds. He must conjure up a land of make-believe, where there has not been, nor will be, a brave new town: but where there is to be supposed the old order of things continuing — a county planning authority which will grant planning permission of various kinds at such times and in such parcels as it thinks best, but with an assurance that in March 1980 planning permission would be available for the residential development of the Walton Manor Estate.

In this imaginary state of affairs, the valuer has then to ask himself: What is the appropriate way of valuing the land with this assumed planning permission?"

PENTREHOBYN TRUSTEES v NATIONAL ASSEMBLY FOR WALES

George Bartlett QC. I would add this observation. The extreme complexity of the issues that I have had to consider, the uncertainty in the law, the obscurity of the statutory provisions, and the difficulties of looking back over a long period of time in order to decide what would have happened in the no-scheme world demonstrate, in my view, that legislation is badly needed in order to produce a simpler and clearer compensation regime. I believe that fairness, both to claimants and to acquiring authorities, requires this.

Such speculation in the years between the launch date and valuation date inevitably leads to delays in settling compensation and may lead to litigation. It is probable that the precise meaning of the wording of paragraphs 15(4) and (5) would be subject to a significant amount of discussion as to what actions of the public authority for the purpose of the statutory project may be disregarded and which may not. It will materially increase cost at the public expense which can be avoided by having regard to actual known facts at the valuation date.

- b) Notice to treat fixes the nature of the interest to be acquired in the same property. Hence you cannot have a cancellation date prior to the date of notice to treat. If you disregard the CPO scheme at the launch date then an investor may say he would not have granted a lease to the actual tenant or granted it on different terms. (this was what happened in the recent Tribunal case on Great Portland Estates v TFL).

Connected issues are

- What would be the terms for the hypothetical unblighted lease?
- Should you assume the compensation payable to the actual tenant is based on this hypothetical unblighted lease? This would require him to pay back to the acquiring authority the windfall profit rent of increased business profits from paying a reduced rent. What if such a tenant did not have the funds to repay it
- Tenants would be incentivised to argue for terms which gave them a lower rent and the landlord would be arguing to completely the opposite
- If the hypothetical lease to the tenant or hypothetical lease from the landlord are not the same then there is a risk the public purse might pay more than the total actual loss.

The assessment of compensation would become chaotic, time consuming and expensive.

For these reasons the cancellation date should be the valuation date so that you value investors and occupiers actual interests at the valuation date. That said cancellation at the valuation date could create inequities. Consequently, if the cancellation date is the valuation date we would recommend for the purposes of assessing compensation, if a claimant can show that the rent passing is not that which would have been set in the absence of the scheme (it could be higher or lower) then such blighted rent will be substituted for the an unblighted rent. i.e. that which would have been set at the previous rent review/ lease grant. All other lease terms remain the same so as to avoid the problems with speculation identified above in Myers and Waters. Whilst not perfect it largely addresses an inequity of the current legislation where the landlord's property is valued on the basis that he is only entitled to the blighted rent until the lease end or next rent review and the tenant gets an unearned windfall profit rent.

The valuation implications are

- Investors would not need to wait until the next rent review or lease renewal to get the unblighted rent. The property would be valued using unblighted rents
- Tenants/occupiers would no longer get a windfall gain of a profit rent caused by paying a lower blighted rent
- Disturbance compensation under Rule 5(6) is for any other matter not based on the value of land. It should be made explicit that disturbance compensation resulting from this change in rental assumption will not be compensatable under Rule 6. Hence a tenant paying a blighted rent in the years prior to the valuation date will have had a windfall increase in profit which they will keep. There will be no retrospective requirement to pay this windfall back to the acquiring authority. The converse will also be true that the landlord who has suffered a reduction in rental income will not have this compensated

Clause 15(4) of the Consultation Paper requires the effects of any action previously taken by a public authority to be disregarded. We assume this carries forward the current understanding that where an acquiring authority and private sector development partner are working together, land assembly or development undertaken by the private sector development partner is not disregarded. There are good reasons why private sector developers should not gain undue financial benefit from the use of compulsory purchase powers. However, this approach can also place constraints on the delivery of regeneration through private/public sector partnerships and can even act as a disincentive for private developers to make genuine attempts to acquire land by agreement in advance of a CPO. Consideration could be given to whether there are circumstances where land acquisition and development by private sector developers who have entered into agreements with an Acquiring Authority should be disregarded as part of the scheme.

Extending the definition of 'the scheme'

Question 4a: Should the definition of the statutory project be extended to include an enabling power which would allow specific transport infrastructure projects to be identified that are to be disregarded within a defined area, over a defined period of time?

Response:

We would agree that the definition of statutory projects is too tightly drawn in paragraph 15(2). It should be wide enough to encompass transport schemes where a CPO is submitted for other statutory functions

Question 4b: If yes, do you have any views on how the wider definition should be expressed?

Response:

Some CPA members have the concern that there is a risk that Acquiring Authorities may be influenced to define their scheme more widely than is reasonable. As definition of the scheme and what is to be disregarded is a compensation valuation matter, it is not something that would normally be dealt with at Public Inquiry. Consequently, if a claimant wanted to challenge the Acquiring Authority's definition of the scheme his only recourse would be the Upper Tribunal. This would expose him to significant costs and risks, which he may be unable to bear or justify. Acquiring Authorities might use this to their advantage and compensation could be unreasonably suppressed. There would therefore need to be some form of regulation that allowed claimants to test an Acquiring Authority's wider definition of the scheme at an early stage.

The matter to be disregarded is development, or the prospect of development on land other than the land acquired from a particular landowner which is itself being valued. It is obvious that when a particular piece of land is being valued the existence of the prospect of development on other nearby land may increase or decrease the value of the land being acquired. It is that effect on value which has to be left out of account in the valuation process.

An illustration might be the construction of roads or public parks by an urban development corporation which then acquires land on this to construct new housing. The value of the land acquired for housing might be enhanced by the existence of such public facilities.

The third step is to know the area, other than the land being valued, within which certain development or the prospect of certain development has to be left out of account when it affects the value of such areas in what are called cases.

Not all of Schedule 1 is obsolete. In particular:

Case 3

On the date of the service of the notice to treat any of the land acquired forms part of an area designated as the site of a new town.

Case 3A

Designated as an extension of the site of a new town under the New Towns Act 1965. For the purpose of applying this provision regard is to be had to the order which designated the new town in its original form and not as varied. This rule provides a cut-off date for the operation of cases 3 and 3A.

Case 4A

Designated as an urban development area under s.134 of the Local Government, Planning and Land Act, 1980.

Mayoral Development Corporations should be treated in the same way as these 3 cases. The legislation should also provide some certainty to acquiring authorities that increase or decrease in value of such schemes should automatically be disregarded. In a similar way such statutory projects should extend to transport schemes (whether promoted before or after another CPO) or by a different acquiring authority.

For example, TfL or its subsidiaries are those promoting a transport scheme, but the regeneration of the wider scheme is being done under the GLA's compulsory purchase powers. Currently paragraph 15 (Rule 13) refers to a single authority not multiple authorities.

What should be disregarded is the effect of both statutory projects even if by different acquiring authorities, if one of those schemes is dependent on the other coming forward. If a bill can be drafted in this manner then we do not think there is a need to identify named infrastructure projects as it will be for the acquiring authority to put its case forward in the CPO or the documents published with it. The Tribunal can then determine on the facts whether it is part of the same scheme. Hence it will be for the Tribunal to determine whether it is not sufficiently related due to the passage of time.

Acquiring Authorities may be influenced to define their scheme more widely they are precluded from extending it later. However claimants are not prejudiced or exposed to increased costs as it is ultimately for the Tribunal to determine the merits of the acquiring authorities case and hence no change in this regard from the current arrangements. This change is a restriction on acquiring authorities and does not increase the burden on claimants.

Question 5: Should other types of infrastructure schemes also be included within an extended definition of the statutory project?

Response:

See above

Putting mayoral development corporations on same footing as new town and urban development corporations

Question 6: Do you agree that for the purposes of assessing compensation the whole mayoral development corporation area and all development in it should be disregarded in the same way as it is for new town and urban development corporations?

Response:

We are supportive in principle of this proposed reform. However, we do not understand how this is to be achieved. It is implicit in paragraph 15(1) of the consultation document that Schedule 1 of the LCA 1961 is to be repealed. That being the case it would not be possible to add MDCs to the table in Schedule 1.

Issues also arise due to the fact that while New Towns have a fixed life, MDCs do not.

Review of the 'Bishopsgate' principle

Question 7: Do you agree that the compensation payable to those with minor tenancies should take account of the period for which the land occupied by the claimant might reasonably have been expected to be available for the purpose of their trade or business?

Response:

The CPA supports this proposal in principle.

There should be no difference between S20 compensation for an interest with security of tenure to which S20 will apply and compensation based on s5(2) + rule s5(6) of the 1961 Act. It would be helpful if the legislation made this clear.

The real issue under BSM is that excluded tenancies with less than 12 months to expiry may have a precarious nature and may be similar to tenancies at will, licences or other precarious interests assessed under S37. However the basis of compensation under S38 is more generous. We see merit bringing excluded leases and S37 disturbance payments into line.

The Consultation Paper refers only to Bishopsgate in the context of Section 20 claims. However, many Acquiring Authorities are applying Bishopsgate to Rule 6 claims as well. Therefore any new legislation needs to make clear that consideration of the period for which land occupied by the tenant might reasonably be expected to be available for the purpose of their trade or business should extend to all disturbance claims.

In any reform we would like to see

1. A repeal of S.20 of the CPA 1965 and S.37, 38 and 47 of the LCA 1973.
2. a single statutory provision replacing both these sections so as to avoid an inconsistent approach.
3. For the purpose of assessing compensation regard should be had to the prospect of the land occupied by a person being available for the continuing purposes of his occupation in the absence of the CPO scheme. The drafting needs to avoid the Tribunal having to determine a certain period that a person could have reasonably remained in occupation, but instead take into

account the likelihood (at the Valuation Date) of them continuing in occupation for the period claimed.

To give effect to this we would suggest the following proposal which is based largely on S37 but would be intended to replace S20 CPA 1065 and S37& 38 LCA 1973

- (1) *This section is to be read in conjunction with Rule 6 of section 5 Land Compensation Act 1961.*
- (2) *Where a person is displaced from any land in consequence of the acquisition of the land by an authority possessing compulsory purchase powers; he shall, subject to the provisions of this section, be entitled to receive a payment hereafter referred to as a "disturbance payment".*
- (3) *A person shall not be entitled to a disturbance payment unless he is in occupation of the land from which he is displaced and unless either -*
 - (a) *he has interest in the land; or*
 - (b) *he has no interest in the land and would have no entitlement to compensation under any other enactment.*
- (4) *For the purposes of subsection (2) above a person shall not be treated as displaced in consequence of any such acquisition unless in respect of a claim under subsection (3) (b) above he was in occupation of the land either -*
 - (a) *at the time when notice was first published of the making of the Order or the formal notification of the draft instrument providing the compulsory acquisition power prior to its submission for confirmation or, where the order did not require confirmation, of the preparation of the order in draft; or,*
 - (b) *in the case of land acquired under an Act specifying the land as subject to compulsory acquisition, at the time when the provisions of the Bill for that Act specifying the land were first published;*
 - (c) *in the case of land acquired by agreement, at the time when the agreement was made;*
- (5) *Where a person is displaced from land in circumstances such that, apart from this section, he would be entitled to a disturbance payment from any authority and also to compensation from that authority under section 37 of the Landlord and Tenant Act 1954 (compensation from landlord where order for new tenancy of business premises precluded on certain grounds) he shall be entitled, at his option, to one or the other but not to both.*
- (6) *In estimating the loss of any person for the purposes of subsection (2) above, regard shall be had to the reasonable prospect of that person remaining in occupation for the continued purposes of his occupation in the absence of any compulsory purchase of the land occupied by him at the time of that compulsory acquisition.*
- (7) *Where the displacement is from a dwelling in respect of which structural modifications have been made for meeting the special needs of a disabled person (whether or not the person entitled to the disturbance payment) then the amount of the disturbance payment shall include an amount equal to any reasonable expenses incurred in making, in respect of a dwelling to which the disabled person removes, comparable modifications which are reasonably required for meeting the disabled person's special needs.*
- (8) *This section does not apply to any land which is used for the purposes of agriculture.*
- (9) *This section applies if the date of displacement is on or after dd/mm/yy*

One view that has been expressed is that reversal of the Bishopsgate principle would be consistent with the common law position where the Court would take into account the prospect of continued occupation. Compensation for compulsory purchase should ensure that any loss that would otherwise be recoverable under common law should remain recoverable.

Reverse loss payment share for landlords and occupiers

Question 8: Do you agree that the current loss payments should be adjusted as set out

Response:

Yes

Question 9: Do you agree that the method of calculating the 'buildings amount' should be changed to the net lettable area?

Response:

No. Net lettable area is a basis of measurement that has little general recognition. However, 'net lettable area' is not an area measurement definition set out in the RICS Property Measurement Professional Statement (adopted January 2016). Its use to assess occupiers loss payments could therefore lead to as much confusion as Gross External Area does currently.

The CPA recommendation is therefore that the buildings amount should be based on Gross Internal Area, as defined in the RICS Property Measurement Professional Statement, which is an industry standard, widely published form of measurement, easily measured and calculated by all.

Penal interest rates to enforce the making of advance Payments

Question 10: Do you agree that the penal rate of interest should be set at 8% above base rate while debt remains unpaid?

Response:

No. We suggest around 4% above base since:

- It is the norm in construction contracts to have a penalty for late payment at 3-4% above base.
- Where there is no punishment the courts would determine it on a case by case basis but the normal range would be 2-4% above base
- In well organised public authorities there should be little exposure to a penal amount whatever the rate. However, many town centre regenerations are funded for developers who are not set up nor have experience in assessing compensation and making a payment within a very short timescale of 2 months. A penal rate of 4% will encourage timely payment just as effectively as 8%

There are concerns that the implementation of a penal rate of interest might influence some Acquiring Authorities to reduce the advance payments they make and thereby reduce their exposure to paying interest. However, while inadequate advance payments are as much a problem as late advance payments we can see no practical way to adjudicate on whether an advance payment (possibly only involving a limited number of heads of claim) is inadequate prior to a substantive hearing considering all matters affecting compensation.

It is not clear to us what is meant by a debt remaining unpaid. Is it the debt the acquiring authority's estimate being delayed – which may not be accurate and may mean a penal rate has been paid on an

incorrect amount, or it is it a penal rate to be applied when an acquiring authority has made a deliberately low advance payment, on the remaining sum that is paid late?

To resolve the perceived harm here, it may be the better approach is for interest to be calculated on a compound basis as that would incentivise early payment, whether of the advance payment or the remaining or delayed part of the compensation due.

Statutory Blight

Question 11: Do you agree with the proposal to increase the qualifying rateable value limit to serve a blight notice in London?

Response:

As an interim measure, the CPA supports the proposal to increase the qualifying RV limit for service of a blight notice in London.

However, the CPA believes that in the interest of fairness and relieving hardship, further reform of the blight notice qualifying criteria are required.

The CPA agrees that a qualifying condition based solely on RV is a blunt tool however the CPA disagrees that it fails to take account of differing land values across the country. In summary, the RV is an estimate of open market rental value, assuming the occupier is liable for all repairs and insurance, as at a set valuation date. Consequently as open market rental value is directly derived from the value of land, and as RV's are based upon evidence of the open market value of land, it necessarily follows that the RV basis inherently takes account of differing land values across the country. This can be evidenced by the following examples of shop RV assessments:

Bridlington (Unit 10, The Promenades) £35,750 RV represents a retail unit of 186 sq m,

Camden (1 Tower Street) £35,500 RV represents a retail unit of 24.8 sq m,

Bristol (Unit CG12, Castle Gallery, Broadmead) £37,750 RV represents a retail unit of 119.3 sq m.

In each case, the higher the values in a geographic location, the lower the size of unit that that a given land value can secure consequently it is fair to say therefore that the RV takes into account variations in value across the country.

However what is being over-looked is that the blight provisions were enacted originally to help the 'smaller' occupier and by definition, small businesses tend to occupy small properties. So 'small' in London would be the same as 'small' in Bridlington in terms of the floor area requirements of the likely occupier, even though the RV will be significantly different in London as compared with Bridlington. Furthermore, even within the same geographic location properties of the same RV but being put to differing uses can have significantly different floor areas vis:

Shop - 26/27 Prince St - £36,750 RV - 426 sq m,

Warehouse - Unit 9 Lancaster Street - £34,500 RV - 1,365 sq m.

The CPA proposes therefore that there should be two alternative qualifying criteria; retaining the criteria based upon RV but adding an additional criteria based on actual floor area occupied, a claimant being entitled to adopt either criteria.

The size of a non-domestic property would be decided by having regard to the total floor area as stated in the VOA Rating List as at the date the blight notice was served.

The CPA would propose a total floor area limit of 150 sq m.

In the event that no total floor area is shown in the Rating List (as not all Rating List entries declare total floor area) the total floor area is to be calculated by reference to Gross Internal Area as defined by the RICS code of measuring practice relevant as at the date the blight notice is served. The claimant will certify that 'the total floor area does not exceed 150 sq m'. Grounds for a counter-notice to be amended to allow the AA to challenge accordingly with LC to be arbiter.

The CPA further proposes that the qualifying criteria, which currently only allow for the service of a blight notice by an occupier, should be widened to allow service by 'small' investor-owners. These can similarly suffer hardship, eg where the investment is to provide for a pension income but the return from the investment is falling due to statutory blight reducing rental income due to inability to increase rents or causing occupiers to vacate thereby causing a complete loss of income. However, recognising that investor-owners must accept the risk associated with property ownership, such claimants would only be allowed to serve a blight notice once the CPO etc had actually been 'made'.

Question 12a: Do you consider there are other parts of the country that may need a higher rateable value limit?

Response:

Yes

Question 12 b: If yes, please state locations where a higher rateable limit should be set.

Response:

All major conurbations.

Repeal of section 15(1) of the Land Compensation Act 1961

Question 13: Do you agree we should repeal section 15(1) of the Land Compensation Act 1961?

Response:

The Committee could not reach consensus on this point. Some members agreed with the proposal for the reasons stated in the consultation document.

Others felt the provision remained necessary. The provision should remain to prevent an acquiring authority or its development partner being able to secure advantage as a result of the repeal. It was felt the section retained benefit to prevent a commercial developer being able to secure land at a reduced value because of the repeal.

Repeal of Part 4 of the Land Compensation Act 1961

Question 14: Do you agree that we should repeal Part 4 of the Land Compensation Act 1961?

Response:

The majority of the CPA 's reform Sub-Committee agrees that Part 4 of the 1961 Act should be repealed. There is however a sizeable number of Committee members that believe the provisions should remain. This perhaps reflects the history of the provisions which have been repealed and re-enacted in the past.

The compensation payable for the land is the higher of the use in its existing state or with development value. In some cases the value is between these figures where there is a reasonable prospect of development happening (generally referred to as hope value). Such compensation is assessed at the valuation date which is at the beginning of the statutory project when the land is vested or possession is taken. S23 of the Land Compensation Act 1961 entitles a claimant to assume as a matter of fact that any planning permission obtained within 10 years of compensation being settled actually existed at the valuation date.

Acquiring authorities will welcome the proposed change since

- Claimants already have the right to get the benefit of planning consents in place at the valuation date, as well as any reasonably foreseeable at that time. The recent changes to planning assumptions within the Localism Act 2011 have increased the potential for claimants to have their land valued as if they had the benefit of planning permission, if their ability to obtain a planning permission could reasonably have been expected at the Valuation Date, or a time after that date.
- Claimants can also make an application under S17 to get a determination as to what other consents may have been obtained in the absence of the blighting effect of the scheme and these are deemed to be in place at the valuation date.

Hence S23 covers only those developments which are not foreseeable at the valuation date, so that there is justification in saying that they are windfall gains for claimants at the public expense.

Public bodies are encouraged to optimise the returns from development and giving away for free the benefit of any redevelopment of land undermines the business case for public investment. On a practical level, S23 claims can be made up to 16 years after the valuation date. Staff familiar with the case will often have left, records may have been destroyed and evidence can be difficult to find. Claims under Part 4 are therefore nearly always expensive to negotiate.

The contrary view is that the provisions operate as a quasi overage provision, reflecting common practice in the commercial property world. If a party secures compensation including hope value at the time of expropriation then Part IV should not come into effect and indeed in practice it rarely does.

If however there is a substantial change in proposals for expropriated land, resulting in a dispossessed party having missed out on compensation it could or should have otherwise been entitled to, Part IV can be seen as being only just and fair and not a second bite at the cherry. After all the land has been expropriated for a stated purpose but will be used for a different purpose, for which the acquiring authority will have given no indication or reason for thinking will apply. It is not clear to those who believe Part IV should remain why the acquiring authority and not the person suffering expropriation should benefit from the resulting gain in value, particularly when it is the acquiring authority which usually has control of the planning process and most likely will have control of the land.

A landowner who sees land that was formally theirs being valued at a level in excess of the planning position presented to them and their representatives will rightly question why the acquiring authority

represented one planning scenario to them but then chose to pursue another. Such a situation has the potential to damage the principles of equivalence and also the reputation of the process for achieving fairness.

A third position put by a committee member is that Section 15 should remain in force, and Part IV should remain on the statute book also but the latter to apply only where the claimant has relied upon Section 15 as the basis for its original claim,

Section 2: Further technical process Improvements

Allowing more authorities to bring forward compulsory purchase orders for joint purposes

Question 15: Do you agree with the proposal to allow the Greater London Authority and Transport for London to promote a joint compulsory purchase order?

Response:

This is a topic where the Committee had diverging views.

Some members see no reason for the GLA and TfL to be able to promote joint orders. It is argued there are already a number of potential acquiring authorities in London with sufficient powers to allow regeneration and transportation and another potential process is not needed. If the issue is that TfL is currently not able to benefit from the value accruing from above station development then it is believed alternative changes to legislation could be pursued to achieve this.

Those supporting the proposed change argue that GLA has housing powers and TfL can secure powers for transport schemes. Submitting CPO powers for 2 separate land assembly processes means objectors can challenge whether land is primarily required for residential use or transport.

As local authorities have powers to join CPOs together it is argued GLA do also have such ability, particularly with their subsidiary company TfL. As the acquiring bodies would still need to demonstrate a compelling need in the public interest for the combined CPO there is no dis-benefit to the proposed change.

Question 16: Do you agree that the proposal should also apply to new combined authorities with mayors?

Response:

Local authorities already have the power to make combined CPOs under section 121 LGA 1972. On that basis we can see that such a provision might be appropriate, albeit as a power that has to be clearly justified on a case by case basis when relied upon.

Making provision for temporary possession

Question 17: Do you agree that all acquiring authorities should have the same

power to take temporary possession of land?

Response:

Yes. Temporary possession should be available in all circumstances where compulsory purchase powers are to be exercised.

There is a significant divergence of approach by authorities in relation to the use of temporary possession powers, which we consider is due to the complete lack of Government guidance on the subject. Authorities can take diametrically opposite views. Thames Water in the Thames Tideway Tunnel DCO says that it will seek to use temporary powers wherever possible instead of permanent powers as the former is considered a lesser interference with the land owner's human rights. However the promoters of the HS2 Bill have stated that land will be taken permanently even where only required temporarily where that would reduce costs. Government guidance on these issues would be very welcome.

In the CPA's view, a nuanced approach is appropriate balancing (amongst other things) the costs to the project of the different options as well as the effect on the land owner and occupier. It should be for the acquiring authority to justify its approach to the authorising body on its merits. Committee members have come across numerous examples where temporary possession is a greater imposition than permanent acquisition.

The cost of temporary possession can also be significantly greater than outright purchase. (Occupation for a long period of time is a factor as is demolition of buildings where the high cost reinstatement, compensation for temporary occupation may be disproportionate to permanent acquisition) Ultimately, claimants have the benefit of the Crichton Down rules were the acquiring authority to seek powers of permanent acquisition over the site. It is for the acquiring authority to justify the need for permanent or temporary acquisition at the public inquiry.

CPA believes the Government should clarify whether compensation can (or cannot, as the case may be) be sought before the date of vacation of the land. Clarification on what is the valuation date in compensation claims arising from temporary possession would also assist, as would clarification of whether the power can be exercised more than once. Clarification of whether permanent works (such as foundations or services conduits) can be installed and also whether demolition of existing structures is permitted – and what limitations are imposed if so (e.g. such as not applying to residential properties) is also necessary. Further, the question of whether temporary powers can be used in advance of permanent acquisition of the same land should be clarified.

The CPA believes that Acquiring Authorities should have the ability to either take temporary possession, or acquire land permanently, but not both. Claimants faced with temporary possession should also have the right to request that their land be acquired permanently as an alternative.

Question 18a: If introduced, do you agree that the power should be based on precedent and model provisions and if so, which ones?

Response:

Compensation for temporary possession is assessed on the basis of the 'loss or damage' sustained. There is often confusion as to what precisely this means and differences in approach arise.

Compensation for loss or damage can be extremely complex to assess. Whilst there is case law on it in relation to claims in Tort it is not used at all in the context of compulsory purchase and hence not understood by the majority of compulsory purchase valuers. Surveyors are however familiar with assessing rental values and also assessing compensation for rule 5(6) for disturbance or any other not based on the [rental] value of land. Indeed S10 of the Compulsory Purchase Act 1965 is in lieu of a nuisance claims in tort but is assessed based on the value of land. We would therefore recommend basing it of S5 of the LCA 1961 rather "than any loss or damage"

Question 18b: If not, what would you suggest instead?

Response:

We recommend that compensation is payable based on a market rent for the site + rule 5(6) compensation assessed at the date of entry with regards to any benefit or loss arising out of the reinstatement. (e.g. where a claimant obtains new for old, or reinstatement to a more modern facility, contamination, remediation etc.)

Where rents for temporary possession are set, they should be paid quarterly in advance from the date temporary possession is first taken. They should also be subject to review after 5 years if the temporary possession extends beyond 5 years.

Reinstatement is difficult. It is common for there to be an obligation to reinstate to substantially the same condition as prior to entry. Sometimes the acquiring authority cannot comply with such an obligation where it has had to be underpinned or the ground strengthened with weak concrete to stabilise it. There needs to be some flexibility on how it is reinstated. There also needs a mechanism for setting off any increase in value

Question 19: Do you have any views on whether modifications to the standard advance payment regime are required for temporary possession cases?

Response:

S.52 does not currently apply to temporary occupation. We believe it should do so. However, we only think this would work if compensation was assessed based upon a rent. Currently compensation is based upon any loss or damage due to the exercise of the powers. This is probably in substitution of a right to claim damages in tort. However, in tort you do not have a valuation date as such and there is a constantly reoccurring action in damages up until the site is vacated. Hence you have a series of valuation dates after each increment payment is agreed or assessed. This does not lend itself to the assessment and payment of compensation in 2 months. We do not think this is workable hence agreeing a market rent is the best way forward as such a rent could then be payable on, say, a quarterly basis as is norm in the property industry.

When assessing a market rent you need to assume a frequency by which you are paying it and assume an end date for handing the site back and any interim rent reviews. This is necessary in order to compare such terms with other comparable transactions and hence derive a market rent. We suggest it is the acquiring authority's responsibility to identify the predicted handback date and unless otherwise agreed there is an assumed rent review in the 5th year. This then leaves it for the parties to agree a different rent review pattern if it is appropriate for this type of property. Likewise unless otherwise agreed the rent should be payable quarterly in advance which is the norm for most properties.

We believe that S.52 should only apply in respect of the disturbance element and any Rule 2 element up to the date of agreement for the market rent.

New legislative requirement to bring orders into operation

Question 20: Do you agree that a target timescale should be introduced from confirmation of an order to the date the notice of confirmation is published?

Response:

Yes

Question 21a: If introduced, do you agree that a 6 week target unless the Secretary of State agrees a different period is appropriate?

Response:

Yes

Question 21b: If not, what should the target timescale be?

Response:

n/a

Impact Assessment

Impact on acquiring authorities and claimants

Question 22: Do you agree with our assumptions that:

a) 'ransom payments' where land is required on a temporary basis are likely to be small and limited in number?

Response:

Yes

b) there are likely to be 2 or fewer transport projects associated with regeneration promoted by public sector acquiring authorities backed by business per year?

Response:

We are unable to answer this question.

Question 23: Do you have any evidence in relation to:

a) the scale of 'windfall payments' to claimants where a compulsory purchase regeneration scheme is facilitated by transport improvements by the public sector?

Response:

No

b) the number of compulsory purchase orders likely to be affected by each proposal?

Response:

No

c) the impact on compensation payments for each proposal?

Response:

No

Question 24: Do you agree with our assumptions on the impact of the proposal to reverse loss payment share for landlords and occupiers?

Response:

Yes

Question 25: Do you have any further comments on the likely impact of these proposals on business interests both for the acquiring authority and claimants?

Response:

No

Question 26: Do you consider that there are potential equalities impacts arising from any of the proposals in this consultation paper? Please provide details including your views on how any impacts might be addressed.

Response:

We are unable to answer this question.