

The Law Reform Lecture 2020

Towards a Temporary Possession Code?

1. Introduction

- 1.1 From the point of view of the promoter of an infrastructure project, the availability of powers of temporary possession (“TP”) provides essential flexibility in allowing the scheme to evolve through the consenting stage and then detailed design. Land can be occupied for a limited period of time to allow for construction compounds to be established and environmental mitigation works undertaken. Compared to permanent acquisition, TP will usually have a lesser impact on land owners and occupiers and on the promoter’s property budget.
- 1.2 But flexibility for a promoter often means uncertainty for the owner or occupier. Will the land be permanently acquired or temporarily possessed (or both)? How long will the occupation last for? How will the land be restored? When will compensation be paid? What happens to the terms of any tenancy?
- 1.3 The Planning Act 2008 (“PA 2008”) extended the availability of TP powers to a much wider range of infrastructure schemes while major projects such as HS2 has brought increased media interest and political scrutiny in the balance between public need and private property rights.
- 1.4 At the same time, TP powers are increasingly being exercised in a sophisticated manner which is often not anticipated by those affected at the consenting stage and in a context where there is very limited guidance from either Government or the courts on when TP powers should be exercised.
- 1.5 In this paper we set out how TP powers have evolved over time; how they are used today; and the issues that can arise from that use. We then look at the provisions in the Neighbourhood Planning Act 2017 (“NPA 2017”) for reform of the system before discussing what we consider to be major issues that still need to be resolved. We note that the provisions of the NPA 2017 have still not come into force and no national government has published proposals for the regulations which must be made under the NPA 2017. Appended to this note is a discussion paper setting out our thoughts (and taking into account those expressed at the CPA Reform Lecture) on what regulations could be made. It is intended to use the discussion paper to consult with CPA members prior to the CPA making

representations to the Government in the hope of encouraging progress towards giving force to the provisions of the NPA 2017.

2. The Development of TP Powers

Statutory powers since 1845

- 2.1 TP powers have been included in local and hybrid Acts of Parliament since the Railways Clauses Consolidation Act 1845 (if not before).
- 2.2 The 1845 Act contained model clauses for TP allowing the temporary use of private roads within 500 yards of the railway and TP of land for the construction of the railway or accommodation works, provided the land wasn't part of residential grounds. Three weeks' notice was to be given and the owner could object to the temporary possession with any dispute being resolved by two justices who were also to assess compensation if it could not be agreed. In certain circumstances, the owner of the land could also compel the railway company to permanently acquire the land.
- 2.3 The Transport and Works Act 1992 established a new regime for the authorisation of railways and tramways to save Parliamentary time in considering numerous local Bills in Parliament.
- 2.4 The introduction of the development consent order regime by the PA 2008 led to TP powers being made available for a broader range of schemes leading to increasing pressure for reform of the provisions.
- 2.5 The modern version of TP Powers was set out in the Transport and Works Act Model Clauses Order in 1992¹ and comprise the following features:
 - Applies to land specified in a schedule which can only be temporarily possessed;
 - A power to remove buildings and vegetation from the land;
 - A power to construct temporary works (including means of access);
 - 14 days' notice must be given to owners and occupiers of the land;

¹ The current version is the Transport and Works (Model Clauses for Railways and Tramways) Order 2006

- The land must be given up by the end of 1 year after completion of the relevant scheduled work;
- Before giving up possession, all temporary works must be removed and the land restored to the reasonable satisfaction of the owner but there is no requirement to replace a building that has been removed;
- Compensation is payable for any loss or damage arising from the TP, disputes being referable to the Upper Tribunal.

2.6 A comparison between recent Transport and Works Act Orders/Development Consent Orders with the model clauses shows limited but significant evolution. In particular:

- TP powers apply not only to land specified in a schedule but to all of the land that may be taken permanently, allowing the promoter a choice of taking the land temporarily or permanently (or temporarily and then permanently);
- However, it is not permissible to acquire permanent rights or impose restrictions on land which is scheduled as only being subject to TP, at least without making it absolutely clear to landowners of the intention to do so (see the Secretary of State's decision on the A585 Windy Harbour to Skipool Improvement Scheme DCO).
- The promoter can construct not just temporary works but permanent and mitigation works on land temporarily possessed giving rise to the need to secure access for maintenance or agree a scheme with the owner in which the latter takes responsibility; and
- The obligation to restore excludes the removal of permanent or ground strengthening works.

2.7 The High Speed (London-West Midlands) 2017 Act contains generally similar provisions but with the power to construct permanent works restricted to those specified in the Act, a rather more generous 28 days' notice given to owners and fairly elaborate provisions for a scheme of restoration of land to be agreed between the nominated undertaker, the owner and the local planning authority with central Government determining a scheme in the event one can't be agreed.

- 2.8 There are similar TP powers for the maintenance of works extending for 5 years after the authorised works are first opened for use but these cannot be applied to residential properties or gardens and only temporary works can be constructed.

The practical use of powers

- 2.9 Just as TP powers have been extended in recent years, they have been applied to different categories of land. Until relatively recently, TP powers were usually only secured and exercised in respect of undeveloped land (e.g. agricultural, open storage or car parking). In the last 10 years, powers have been secured more frequently for TP of developed land partly in the hope of reducing compensation costs but sometimes also because of a view that TP is a lesser interference with human rights than compulsory purchase (this proposition is discussed in more detail later in this paper).
- 2.10 While the use of TP powers before the Planning Act 2008 was rarely controversial, their extensive recent use has brought into focus a number of tensions. For example, it was unclear when the limitation period for a claim for compensation arises (at the beginning or the end of the temporary possession)²; owners and occupiers are often concerned that they do not know when the land will be handed back to them; there is no provision for advance payments of compensation; and it is unclear what “loss and injury” covers in terms of compensation.
- 2.11 Concerns of this sort led to pressure by stakeholders, including the CPA, for primary legislation to create a temporary possession code.

3. The Neighbourhood Planning Act 2017 (“the NPA 2017”)

- 3.1 The NPA 2017 introduced what is effectively such a code. In summary terms the provisions are as set out below.
- 3.2 Section 18 extends the availability of TP powers to any authority who would be able to make a CPO.
- 3.3 Section 19 sets out a procedure for authorisation. The authorising instrument can be for TP alone or TP with compulsory purchase powers. The authorising instrument must identify the land subject to

² Karas, Tozer & Denyer-Green (JPL 2016 p 756-763) argued persuasively that each day of temporary possession creates a cause of action (akin to trespass) so that, for example, a claimant whose land had been temporarily possessed for seven years would risk a limitation defence being brought against the first year’s loss.

TP, describe the purposes for which TP is required and specify the period of time for which the land may be subject to TP.

- 3.4 Section 20 sets out notice requirements. A notice must give at least 3 months' notice and specify the period of TP. Subsequent notices can be given to (effectively) extend the period of TP. Any notice must be served within 3 years if the authorising instrument is a CPO or 5 years if not.
- 3.5 Section 21 contains provisions for freeholders and occupying leaseholders to serve counter-notices (within 28 days of receipt of a TP notice) which would limit temporary possession to 12 months for residential properties or six years for other types of property. The authority must accept the limitation, withdraw the TP notice or proceed to compulsorily purchase the land. A leasehold occupier may also serve a counter-notice to the effect that the authority cannot take temporary possession of the land and must either withdraw the TP notice or compulsorily purchase the land. The authority must respond to a counter-notice within 28 days (but it is unclear what happens if it does not).
- 3.6 Section 22 applies section 13 of the Compulsory Purchase Act 1965 so that an Authority can enforce a TP notice.
- 3.7 Section 23 provides for compensation to be payable to a claimant with an interest in or right to occupy land temporarily possessed for "loss or injury" sustained. A "beneficial claimant" with the benefit of an easement or restrictive covenant over the land may also claim. When the claimant is a business, regard must be had to the period for, and the terms on which, they might reasonably have been expected to continue to trade at the land and the availability of relocation premises for the duration of the period of TP. The limitation period applies from the last day of the temporary possession and statutory interest runs from the day after.
- 3.8 Section 24 allows claimants to apply for advance payments. The authority must make an advance payment if a TP notice has been given but may not do so if it has not. The provisions are otherwise similar to the compulsory purchase advance payment regime.
- 3.9 Section 25 applies for interest to accrue on late advance payments.
- 3.10 Section 26 contains consequential amendments.

- 3.11 Section 27 sets out the powers of an acquiring authority in relation to TP land including the right to remove or erect buildings to the extent that it would be able to do had it acquired all interests in the land. The authority may also use the land irrespective of any interference with an existing right or contractual restriction on the land. However, use is limited to that described in the authorising instrument.
- 3.12 Section 28 provides that a tenant is not to be deemed to be in breach of the terms of a tenancy in consequence of temporary possession (except the payment of rent). A protected tenant is deemed to continue to occupy for the purposes of Part 2 of the 1954 Act unless the tenant informs the landlord and the authority that he does not wish to resume occupation.
- 3.13 Section 29 contains supplementary provisions requiring the appropriate national authority to make provision about

4. **Regulations**

- 4.1 Section 30 sets out the areas in which regulations can be made by the “appropriate national authority” – that is the Secretary of State or the Welsh Ministers (where they are the acquiring authority or the confirming authority). The potential scope of regulations is broad.
- 4.2 Subsection 1 requires the national authority to make provision for the reinstatement of land and the resolution of disputes about reinstatement.
- 4.3 Subsection 3 devolves broad powers to the national authority to make regulations in relation to the authorisation and exercise of the power to take TP under section 18 and the circumstances in which an authority may be authorised to acquire land after securing TP powers. A number of examples (which do not appear to be exclusive) are given in subsection 4 including:
- An ability to modify any provision in relation to particular cases or types of case as the national authority considers necessary or expedient “*for giving full effect to a provision*”. In all but name, this is a power for the national authority to amend primary legislation.
 - Limit the period for which an acquiring authority may take TP and the circumstances in which it may do so.
 - Make provision about the use to which land which has been temporarily possessed can be put
 - Limit the types of land which may be subject to temporary possession.

- Require an authority to provide specified information relating to a period of TP to specified persons before, during or after the period.
- Make provision in relation to a sale by a person with an interest in land which is or may be subject to TP.
- Make provision for a person with a right to occupy land subject to TP to be deemed to occupy that land for specified purposes during the period of TP.

4.4 Before making regulations under section 30, the national authority must carry out a public consultation.

4.5 The regulations will require approval by Parliament or the Welsh Assembly under the affirmative procedure (but note that it is very rare for approval not to be secured under that procedure).

4.6 There has been no indication of any action having been taken by either national authority to develop regulations.

4.7 Preliminary discussions amongst the CPA temporary possession working group have suggested that light touch regulation on some of these topics may be the appropriate way forward in the first instance.

5. **Is temporary possession a lesser interference with human rights than permanent acquisition?**

5.1 The Human Rights Act 1998 enshrined the European Convention on Human Rights into UK law. Article 1 of the First Protocol to the Convention states

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

5.2 A question arises as to whether the granting and exercise of TP powers represents a lesser interference with the right to hold property without interference than permanent compulsory acquisition powers.

- 5.3 The examining authority in its report on the Thames Tideway Tunnel³ noted that one of the elements of the promoter's land acquisition strategy was "*[to] make extensive use of the temporary possession power...to minimise the use of CA powers and, whenever possible, enabling land to be returned to owners once construction has been completed*".
- 5.4 In other words, TP powers were regarded by the promoter as a less intrusive alternative to compulsory acquisition powers. The examining authority was not initially convinced and expressed its concern as to the:
- "...nature and extent of the power of temporary possession...since it has the characteristics of a CA power without the same requirement of scrutiny as applies where a CA power is sought.*
- By way of example, in plots 16 and 33 in LB Lewisham the Applicant seeks a power of temporary possession. The effect of this would be to remove the tenant Graham Group and Jewson Limited from the land which they presently occupy under a lease from the freeholder, allow demolition of the building they occupy, without any duty to replace such a building, allow exclusive possession for the Applicant for some six to eight years, whereupon the lessee will be allowed to go back into occupation (although without the provision of a replacement building to occupy and use), with the payment of compensation for the interference which has taken place."*⁴
- 5.5 However, "*The Applicant submits that whilst there is an interference with the tenant's interest it is proportionate and importantly there is an obligation to pay compensation. We are advised that the case of 'Sporrong and Lönnroth v Sweden (1983) 5 EHRR 35' gives authority for this approach and this we accept to be the current legal position notwithstanding our misgivings and significant concerns*".
- 5.6 *Sporrong* (a decision of the European Court of Human Rights) was not in fact concerned with TP powers but with two valuable properties in Stockholm which had been subject for very long periods of time (more than 20 years for one of the properties) to expropriation permits and a prohibition on development. This appears similar to safeguarding in a UK context.
- 5.7 The Court held that "*Being combined in this way, the two series of measures created a situation which upset the fair balance which should be struck between the protection of the right to property and the requirement of the general interest: the Sporrong Estate and Mrs Lönnroth bore an individual and*

³ Paragraph 19.38

⁴ Paragraphs 19.269-271

excessive burden which could have been rendered legitimate only if they had had the possibility of seeking a reduction of the time-limits or of claiming compensation. Yet at the relevant time Swedish law excluded the possibilities and it still excludes the second of them.”

5.8 The promoter of the Thames Tideway Tunnel considered that its strategy of seeking TP powers rather than CA powers where possible to be the proper approach in seeking a fair balance between an individual’s property rights and the public interest.

5.9 The promoter of the HS2 Bill took a different approach as noted in the report on the Bill by the Select Committee of the House of Commons at paragraph 355:

“The Promoter’s powers of land acquisition and occupation are set out in the Bill. The Promoter has given undertakings on minimising the extent of acquired land. During our proceedings, we frequently directed or attempted to nudge the Promoter toward either smaller land take or shorter duration of occupation, particularly in the case of farms. As we conclude our work, we remain concerned that the permanent occupation powers are being used too extensively. We do not intervene to direct that the Secretary of State should not consider the economics of particular cases, but we do believe that the Government should be circumspect in considering economics of land occupation given the railway’s objective of developing the economy, helping to change the economic geography of the country for the better.”

5.10 The promoter’s response was as follows:

“The Promoter has given wide ranging assurances to the NFU and CLA on the issue of temporary versus permanent land take and has issued an explanatory note on the use of temporary occupation powers under Schedule 17 of the Bill rather than outright acquisition. Temporary occupation costs can be high where occupation is for long periods, in urban areas and on development sites. In these circumstances, the Promoter will seek to be reassured that it is economic to proceed with temporary occupation in accordance with the duty to protect the public purse.”

5.11 There was no question of the relative impact on human rights of TP and permanent powers or seeking a fair balance. Instead, permanent acquisition would be preferred if it would entail a lower level of compensation.

5.12 The different approaches taken by the promoters of the Thames Tideway Tunnel and HS2 demonstrate, in our view, the inadequacy of a “one size fits all” approach to seeking a fair balance

between private and public interest. The lack of any Government or judicial guidance on how to assess the balance requires every promoter to take their own view of it and then apply it in a consistent strategy irrespective of the particular circumstances of the individual owner or occupier.

5.13 If the counter-notice procedure set out in the NPA 2017 is ever brought into force, along with appropriate guidance, it will provide a significant choice for the individual owner-occupier in many situations. We explore in the next section of this paper whether the counter-notice procedure shifts the balance too far the other way.

6. **The counter-notice procedure**

6.1 As set out above under section 21 of the NPA 2017 where a TP notice is served in relation to land or property the freeholders and any occupying leaseholder can serve a counter-notice which limits TP to six years (or 1 year for residential properties). The acquiring authority can accept this or withdraw the TP notice or acquire the land permanently. An occupying leaseholder has the option of serving a different kind of counter-notice requiring the authority to acquire permanently or not at all.

6.2 For many projects, six years should be sufficient time to carry out the necessary works provided they are programmed and contracted efficiently. On larger projects, where temporary possession may extend to 10 years or more the time limit will be a significant restraint and provision will have to be made in property cost estimates to allow for the possibility that permanent acquisition will be necessary and compensation payable accordingly.

6.3 The counter-notice provisions, if and when they are brought into force, represent a significant shift in the balance of power between property owners and occupiers and acquiring authorities and we think resolve any human rights issues as to which is a lesser interference. However, there may be unintended consequences – promoters may well seek and exercise permanent powers rather than temporary to reduce uncertainty.

6.4 There remain unanswered questions as to how the procedure will actually work in practice (and it should be noted that the counter-notice process is not to be fleshed out by the regulations). It is particularly unclear what happens where only one of the freeholder and the occupying leaseholder serves a counter-notice. For example, if the leaseholder under a 14 year lease serves a notice requiring permanent acquisition of its interest (or no acquisition at all) and the authority acquires the

leasehold, what happens in relation to the temporary possession against the freehold interest? The authority may have no use for the property after a couple of years but be left with a lease which it may have difficulty assigning.

7. **Conclusion**

- 7.1 The NPA 2017 represents a step change in the regulation of the use of TP powers. There are different views as to whether that change is welcome or sensible. However, Parliament having debated and passed the legislation it is the responsibility of MHCLG to bring it into force.

- 7.2 With that in mind, the CPA wishes to convey the views of members on the effect of the delay of bringing the NPA 2017 provisions into force and what the regulations should contain.

Annex: Consultation questions

When the NPA Bill was passing through Parliament information was provided by the then DCLG as to how Government intended to exercise the Bill's delegated powers and the likely matters that would be covered by secondary legislation made under those powers. In the case of temporary possession DCLG noted that:

"there are a wide range of circumstances in which the need for temporary possession of land might arise and so we need to make different provision to deal with those different circumstances in "the temporary possession regulations". We have, and will continue to, carry out extensive engagement with stakeholders and as a result of the engagement that has already taken place, we consider that it is likely to be necessary for the temporary possession regulations to make bespoke provision relating to the following".

This consultation seeks your views on DCLG's thinking and also seeks comments on any other matters which should be covered by the Regulations or the Guidance.

1. Orders under the Pipe-lines Act 1962 and Gas Act 1965

Development consent orders can modify or exclude a statutory provision which relates to any matter for which provision has been made in the order. Similar provisions also apply to orders made under the Transport and Works Act 1992 and the Harbours Act 1964. This means that Orders made under these regimes could contain provisions allowing acquiring authorities to exclude the temporary possession powers in the Bill (once brought into force) and substitute them with alternative temporary possession powers or modify them. However, where compulsory acquisition is authorised by an Order under the Pipe-lines Act 1962 or the Gas Act 1965 there is currently no corresponding power to modify or exclude statutory provisions relating to matters for which provision has been made in the Order.

Should the Regulations enable Orders under the Pipe-lines Act 1962 or Gas Act 1965 to include tailored temporary possession provisions similar to those that will be available to other similar bespoke consenting regimes?

If not why not?

2. Special kinds of land

The Government proposes that the temporary possession regulations should provide that temporary possession will only be allowed where the confirming authority is satisfied that it would not cause serious detriment to the owners or users of the land, for the following special kinds of land:

- land forming part of a common, open space or fuel or field garden allotment;
- land held by the National Trust inalienably
- local authority owned land; and

- land held by statutory undertakers.

These special kinds of land are afforded additional protection from compulsory acquisition and the Government believes that it is necessary to provide a similar level of protection for such land in temporary possession cases.

Do you agree?

Is the serious detriment test an appropriate test?

Do you see any problems with the suggested test?

In addition, MHCLG propose that the temporary possession regulations will provide that for statutory undertakers' land where the acquiring authority proposes the removal of certain apparatus belonging to the statutory undertaker, temporary possession will only be allowed where the confirming authority is satisfied that the removal is necessary for the purposes for which the temporary possession is required.

Is this a sufficient safeguard for statutory undertakers?

3. Separate authorising instrument for temporary possession alone

The Government proposes through the temporary possession regulations to allow certain acquiring authorities (e.g. those whose powers of compulsory acquisition are granted by Development Consent Orders) to seek temporary possession powers through a different authorising instrument in such circumstances.

In most cases we would expect acquiring authorities to be seeking authorisation for the compulsory purchase of the land for the scheme and the land needed temporarily in the same authorising instrument. However, there may be circumstances where temporary possession needs to be sought separately. The Act provides that temporary possession should be authorised by the same type of instrument as is or would be required for the compulsory purchase. However, where the compulsory purchase had been sought through a Development Consent Order, for example, this would not be a straightforward process.

Do you agree with this proposal?

Do you see any issues with the suggested proposal?

4. The treatment of parties with a subordinate interest in land (e.g. leasehold interest) that is the subject of temporary possession

There is a need to address the impacts of temporary possession of land subject to subordinate interests such as leases, tenancies or mortgages. For example, leaseholders may remain responsible to the landlord and vice versa for observing the terms of the lease, such as for the use, repair and

payment of rent. However, as neither party will have control of the land during the temporary possession period they may not be able to meet their respective obligations under the lease.

The Act does clarify landlords' and tenants' obligations to each other during the temporary possession period. Section 28 provides that where an acquiring authority takes temporary possession of land subject to a tenancy, the terms and obligations of the tenancy, with the exception of the payment of rent and the length of the tenancy, will be disapplied to the extent that the temporary possession prevented reasonable compliance with them

Are there other matters which the Regulations should be covering to the address the impacts of temporary possession of land subject to subordinate interests such as leases, tenancies or mortgages?

Should provision be made to address issues such as how break clauses and rent review provisions under leases should be dealt with where temporary possession powers are exercised? If so, how would you see these being modified?

5. **Notice of intended entry**

Clause 20 requires acquiring authorities to serve a notice of intended entry on each person who has an interest in or right to occupy the land before taking temporary possession. The section sets out the basic information to be included in the notice being the period after the end of which the acquiring authority may take temporary possession of the land (notice period) which must not be less than three months and the period for which the acquiring authority is to take temporary possession of the land.

The Government proposes that the temporary possession regulations prescribe what additional information should be included in the notice of intended entry in different circumstances. For example, where an acquiring authority intends to undertake works on the land, it may be helpful for the notice of intended entry to set out details of the works and proposed timescales.

What further information (if any) should be included in the notice of intended entry?

6. **Sale of land during temporary possession period**

The Government proposes that the temporary possession regulations prescribe the circumstances in which an acquiring authority may be required to acquire land permanently where an owner is obliged to sell the temporary possession land and set out the basis of the valuation of the land concerned in these circumstances. The Government consider this is necessary because there may be circumstances where, during the temporary possession period, those who own or administer the title to the land may wish/need to sell the land (e.g. in the event of death or divorce, or if an owner was declared bankrupt). It is highly unlikely in these circumstances that any third party would want to buy the land at its market value where temporary possession powers are being exercised.

Do you have any views on this suggestion? Should there be restrictions e.g. when the period of temporary possession to run is less than a number of months?

7. Re-instatement following temporary possession

The Government proposes to make provision in the temporary possession regulations that the acquiring authority must reinstate the temporary possession land to 'the reasonable satisfaction of the owner of the land' at the end of the temporary possession period. Government note that depending on what purpose the land has been used for during the temporary possession period, there may be a need to reinstate it to its previous condition before it can be returned to the owner. This will clearly depend on the particular circumstances of each case and so it is difficult to set out specific criteria on how land should be reinstated which would be relevant in all cases.

Do you agree with the Government's approach?

8. Other matters

In terms of other matters or variances on the above the Regulations could be used to:

- Prescribe the circumstances in which an AA may be authorised to acquire land after being authorised to take temporary possession of it;
- limit the period for which an acquiring authority may take temporary possession of land further;
- limit the circumstances in which an acquiring authority may take temporary possession of land;
- make provision about the use by an acquiring authority of land of which it has taken temporary possession (for example, by limiting what an acquiring authority may do or by requiring an acquiring authority to do certain things).

The CPA would welcome other comments and thoughts on all or any of the above matters.