COMPULSORY PURCHASE ASSOCIATION LAW REFORM LECTURE 2023

WHAT IS FAIR COMPENSATION?

Introduction

Thank you Dave. It is a pleasure to be here today and to follow in the footsteps of many illustrious predecessors in giving this lecture.

It is also a pleasure to be here at BDB Pitman's offices. And perhaps there is nowhere more suitable for this talk today. I am myself formerly associated with this firm, but more importantly, in a couple of weeks' time, a current employee here will take up the mantle in leading the Law Commission's review of compulsory purchase. I wish Ben well in that venture and I have no doubt we all want you and the remainder of the Law Commission team to succeed in their work.

So, the topic of law reform in compulsory purchase is now "hot". As an area of law, it is now at the start of a journey that will take it to one that will hopefully be more accessible to all of us. The Law Commission's review is both exciting and a challenge. It is incumbent on us to help make that review a success and I hope you will support them in that work.

This lecture could easily be dedicated to what areas of law we think the Law Commission should focus on in modernising the law and ironing out the technical issues that we have in its current shape. And perhaps that is a topic for a future lecture, or even future lectures. However, the Law Commission's review at its heart is not about reforming the current law to shape any aspect of it into something fundamentally different from what it is currently. It is about consolidation, modernisation and dealing with technical challenges. Where there are practical problems they will look to resolve them, where there is antiquated language they will look to bring it into the modern age.

Instead, there is present reform on the table and matters more pressing on the horizon, in the shape of the Levelling-up and Regeneration Bill. This lecture has often proved an important moment in discussing matters of law reform that have often gone on to become something more concrete. Indeed, some of the contents of the current Bill had its origin in the subject of a previous Law Reform Lecture and subsequent work. However, today's lecture is concentrating on the here and now, reform that is present and upon us.

The Levelling-up and Regeneration Bill has made its way through the House of Commons – making its way through committee with the compulsory purchase provisions subject to less than a 30-minute discussion. But that discussion was predominately not about what is in the Bill, but what is not in the Bill.

And probably never has there been a timelier law reform lecture than this, because the Bill has now reached the House of Lords. Amendments to the compulsory purchase provisions in the Bill have already been submitted by cross-benchers and the opposition. If any amendments from the Government to those provisions in the Bill are to be forthcoming, then we should expect them imminently and the government have indicated that we can expect amendments.

It's one issue in particular that is attracting attention in relation to compulsory purchase and that is the question of value associated with prospective planning permission. It is the one outstanding issue that remains to be resolved from the policy intentions indicated by the Government so far in relation to that Bill.

Last summer, the Development for Levelling Up, Housing and Communities launched a consultation looking at levels of compensation which are paid for value associated with prospective planning permission. It is a topic that has been rumbling for many years. It has formed part of papers and articles, parliamentary committee reports and debates. Arguments and counterarguments put. But all the time gaining increased political support. The bubble on the topic was finally burst last summer when Ministers required reform as part of the Levelling-up and Regeneration Bill. The Government launched their consultation and proposal on the issue. For the first time all interested parties were invited to submit their views.

I think it took involved in compulsory purchase work a little by surprise. Possibly thinking that the issue had gone away, at least for the time being, and that there were other matters to be concentrated on. However, the Bill is in the Lords and the compulsory purchase Part is looming closer and with the last day of debate in the House of Lords committee expected to be 22 March we do not have long to wait. Government amendments would need to be laid shortly on anything related to compulsory purchase. So we are days away from finding out what direction the Government will take on this.

There are two possibilities. Either firstly amendments will be introduced to address the perceived issue, whether those amendments are in line with the consultation last summer or something different, or secondly that amendments will not be introduced. But one thing I suspect will not change. Discussion around the extent of reform on this point is unlikely to go away.

And so, it is important we have an informed debate and that those involved in compulsory purchase grapple with the issues raised. There is a need to understand the issues and seek solutions to help resolve those issues rather than ignore them. Are there ways that the compulsory purchase process and compensation could be adapted to address the issues that are at the heart of the problems that have been identified by advocates of reform? In this lecture, I will by no means suggest that I have all the answers, but I will try to set out the framework in which changes are possible in this space and explore a couple of avenues that have not been looked at in detail before.

I should add at this point before I am hounded on the issue, that in referring to value for prospective planning permission in this lecture, I refer to the value of a potential planning permission that is not in place at the valuation date for an alternative use to the scheme, whether or not it is later determined that it is appropriate alternative development within the meaning of section 14, and whether hope or development value is ultimately the appropriate compensation.

Human rights

Fundamental to what reform can be made in this area is the question of human rights. Compulsory purchase is the acquisition against someone's will of their land or rights in land.

There are different phrases that can be used to describe compensation, but two in particular have been used frequently through its history, "full" and "fair". Sometimes the terms are used in the same breath, sometimes they are distinguished. Is fair compensation, full compensation? You might argue that to be fair it must be full. But what does full then mean? How far does compensation need to go to be "full"? This is crucial to the question in front of us. Compensation for prospective planning permission. This is compensation over and above existing use value and is not a tangible loss.

To fully evaluate the issue, we need to first explore two concepts: human rights and the principle of equivalence. I will examine those in that order, starting with human rights.

The concept of compulsory purchase compensation was formulated well before we had our modern form of human rights law. As I will explain shortly, the basis of compensation principles was well evolved in looking to compensate someone for their loss before the European Convention on Human Rights came along. But human rights law has now been inserted into the equation, and therefore any measure of compensation for the loss of land or rights needs to now be considered against that framework.

In general, the existing framework for compulsory purchase compensation in England and Wales is considered to be compliant with human rights law. In general terms, the existing law attempts to ensure that someone is paid for the value of their land or rights and has provisions in place for additional losses that may be suffered as a result. In some places arguably providing additional compensation over and above actual loss. But what if it did not? What if it tried to not pay someone all of their actual losses or not pay someone all of what is perceived to be the value of their land?

There are now some reasonably settled principles around the interpretation of the European Convention on Human Rights and in particular article 1 of the Protocol to the Convention which provides: *"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 the general principles of international law. The preceding provisions shall not, however, in any way impair the right of the 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.""*

It is expected in the ordinary course of events that compensation is paid for the deprivation of such possessions, however the interpretation of the article has given states a margin of appreciation in assessing the basis upon which compensation is paid. That in turn looks at the question of public interest and the balancing of private and public interests in seeking to achieve the aim in question. It opens the possibility that someone might be paid something which is regarded as less than the financial equivalent of what they will lose. In *Lithgow v UK* (1986) 8 EHRR 329[1] an often-quoted paragraph from the judgment is as follows: *"The Court further accepts the Commission's conclusion as to the standard of compensation: the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be justified under Article 1. Article 1 does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of 'public interest', such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value."*

Further: *"A decision to enact nationalisation legislation will commonly involve consideration of various issues on which opinions within a democratic society may reasonably differ widely. Because of their direct knowledge of their society and its needs and resources, the national authorities are in principle better placed than the international judge to appreciate what measures are appropriate in this area and consequently the margin of appreciation available to them should be a wide one."*[2]

[1] Paragraph 121
[2] Paragraph 122

The issue is one therefore of proportionality. Is the public interest objective being pursued sufficient to justify the means being taken to achieve that objective? In this case, something that is perceived to be less than "full" compensation.

At a high level, there may be circumstances where you may more easily start to consider that a public interest test is met. For example, property owned by an enemy of the state in some shape. But each circumstance would need to be assessed on its own merits, and to some degree the state has a margin of appreciation in setting the agenda as to what it considers as important factors in the public interest. It's also very possible that those factors will not stay still. What might be an overriding public interest today could prove to have a different weight in 30 years time.

In summary, the basic expectation from a human rights perspective is that compensation commensurate with the value of land and rights taken together with further losses is paid, however that is not absolute obligation and the public interest may override that.

Principle of equivalence

I move onto the principle of equivalence. The concept of the principle of equivalence is one that has been discussed in case law since the industrial age of the 1800s.

The Land Clauses Consolidation Act 1845 provided limited information about how parties should be compensated and more detailed rules developed through judicial decisions designed to ensure that an affected party was compensated for the value of their land or right and other losses. Those rules developed from similar rules relating to trespass but developed through this concept of compensating for value and losses.

Those rules in judicial decision were codified to a degree in 1919 and then later re-enacted in what we now know as the Land Compensation Act 1961. The guiding principles that we have for compensation are therefore routed in the development of the rules from judicial decisions, underpinned by the concept of compensating for value and losses to put a party into the equivalent financial position, the principle of equivalence. However, the Acquisition of Land (Assessment of Compensation) Act 1919 was to some degree an attempt to rein in the courts in assessing what should and should not be paid as compensation. In *Horn v Sunderland Corpn* [1941] 2 KB 26, Scott LJ stated: *"The main object of the Act of 1919 was undoubtedly to mitigate the evil of excessive compensation which had grown out of the theory, evolved by the Courts, that because the sale was compulsory the seller must be treated by the assessing tribunal sympathetically as an unwilling seller selling to an unwilling buyer."*[3]

Scott LJ then went on to set out what is often looked upon as what is now regarded as the principle of equivalence: *"…what it gives to the owner compelled to sell is compensation – the right to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed on him in the public interest, but, on the other hand, no greater."*[4]

So, prior to 1919, Scott LJ indicates there was a perception of excessive compensation, considering compensation from the perspective of the value of the land to its owner. The intention of the 1919 was to try to implement a strategy for the acquisition of land that paid a landowner for their actual loss – equated to the objective market value. In broadly carrying those rules across into the 1961 Act, the same intention was then said to apply.

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[3] At page 40
[4] At page 42

However, many of the key cases in compulsory purchase have grappled with this principle since. The extent to which it can be used to interpret legislation in a way that is deemed to produce a fair result, not just for the claimant, but also for the acquiring authority. The question of proper purposive construction and impermissible judicial legislation. In general, the courts have used the principle of equivalence as an aid to that purposive construction, at times assuming, that Parliament would neither want to have under compensated or over compensated. However, that principle only goes so far and if Parliament's intention with the legislation is clear, that it intends to either under-compensate or over-compensate, then it is also clear that it did not intend the principle of equivalence to apply.

Quoting Barnes on the point: *"While the principle of equivalence is undoubtedly important in interpreting the statutory law it should not be taken too far. In the end the duty of the court is to find the meaning of the statutory provisions and to apply that meaning."*

In *Transport for London v Spirerose* [2009] UKHL 44 Lord Walker said: *"…Parliament has enacted a statutory code of some complexity demonstrating that it does not regard all these cases as 'materially similar'. For the court to try to correct the code in accordance with the principle of what is fair would amount to judicial legislation. It would upset the balance of the code which Parliament must be supposed to have considered carefully."*[5]

In *Secretary of State of Transport v Curzon Park Ltd and others* [2021] EWCA Civ 651, Lewison LJ set out what he regarded as the reality principle, that the valuation must be considered in the real world and went on to say: *"…the starting point is the real world, modified either by an express statutory assumption, or by what is necessarily inherent in the concept of an open market valuation. If there is ambiguity in an assumption that the statute requires to be made, then the principle of equivalence may assist in resolving the ambiguity, but it is not an overriding and free-standing principle."*[6] I recognise of course that *Curzon Park Ltd* is subject to appeal in the Supreme Court and is to be heard this Spring. No doubt more will follow on the principle of equivalence from the Supreme Court.

However, I think we can say that Parliament is sovereign. It may legislate as it wishes to compensate for the acquisition of land and rights and in so doing over or under-compensate. But in considering whether it under compensates it is constrained by the limitations of the ECHR, and, in considering whether to both under and over-compensate, its intention to do so needs to be clear so that any lack of clarity is not interpreted to conform with the principle of equivalence.

There is also an interesting dynamic in the caselaw between "fair" and "full". One question is "fair" to who? Scott LJ in *Horn* suggests that prior to 1919 there was a tendency to look at "fair" very much from an owner point of view. The 1919 Act set out a more objective principle on value to reflect the market position which was brought into the 1961 Act. "Fair" to the individual might therefore imply "full" compensation, possibly more to account for the nature of the loss.

"Fair" in the context of the EHCR is different. It acknowledges the loss to the individual, but does not consider that in isolation. It allows wider factors in the public interest to be considered.

Further, what is fair when compared to full? I hope I am on safe ground in saying that with any valuation there is a degree of variance. You are unlikely to find three surveyors valuing a property at exactly the same amount. But all their valuations might be deemed fair ones

[5] At paragraph 41
[6] At paragraph 43

giving a small percentage allowance for what might be deemed market. Can all of those valuations be full compensation even though one valuation may be higher than the other two?

Examples of where the "fair" and "full" have been conflated in existing caselaw are as follows:

Lord Nicholls in *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] UKPC 7 111: *"The purpose of these provisions … is to provide fair compensation… This is sometimes described as the principle of equivalence. No allowance is to be made because the resumption or acquisition was compulsory; and land is to be valued at the price it might be expected to realise if sold by a willing seller, not an unwilling seller. But subject to these qualifications, a claimant is entitled to be compensated fairly and fully for his loss."*[7]

Lord Collins in *Spirerose*: *"…the underlying principle is that fair compensation should be given to the owner claimant whose land has been compulsorily taken. The aim of compensation is to provide a fair financial equivalent for the land taken. The owner is entitled to be compensated fairly and fully for his loss, but the owner is not entitled to receive more than fair compensation."*[8]

How this relates to the topic in front of us is crucial. Some would argue that value associated with prospective planning permission is crucial to receiving "full" compensation and that it is only "fair" for an owner to receive "full" compensation. The caselaw suggests that the starting point in decisions has been that "full" compensation is the only "fair" compensation.

Others argue that value for prospective planning permission is value which has not been earnt by the landowner and that receiving value for existing use value is "fair" even though possibly in the open market a higher price might be obtained.

But what is "full"? There is no doubt that in the open market, buyers may be willing to pay a hope value element in purchasing property that has a prospect of development and also to encourage a landowner to bring that land forward for development.

But the current compulsory purchase compensation system allows a prospective planning permission for alternative use to that of the scheme to be converted into a hypothetical planning permission which potentially realises a higher development value than may have been possible under simply hope value. Is that "full" compensation or sometimes "over" compensation compared to what might have happened in the no-scheme world?

Land Compensation Act 1961

To fully explore this, we need to remind ourselves of what the Land Compensation Act 1961 does. I previously mentioned its origins from the 1919 Act and rules that sat in caselaw before that. The 1961 Act provides the basic platform for the payment of compensation arising directly from the acquisition of land through six rules in section 5 and further ancillary assumptions around those rules in later sections. Most importantly, the value of the land itself and costs arising as a result of the acquisition of the land or rights. You cannot therefore simply repeal the 1961 Act without replacing it with something that provides a basic form of compensation for the acquisition of land or rights.

[7] At page 10
[8] At paragraph 88

Since 2016, the Land Compensation Act 1961 has also codified the no scheme principle, which I will come onto in more depth later. That is the principle that, in assessing the value of the land, you ignore the effect of the scheme, both positive and negative.

At section 14, the Act provides the assumptions on which the assessment of the value to be attributed to both extant and prospective planning permission is based. Section 17 provides one mechanism to determine with certainty whether planning permission for an alternative use to that of the scheme would have granted for valuation purposes through a certificate of appropriate alternative development.

The changes that are already in the Levelling-up and Regeneration Bill to sections 14, 17 and other related sections change elements of how those sections work. And in line with the Government's policy in this space, some of the changes put more of an onus on the claimant in proving development or hope value and costs associated with that. However, those changes do not fundamentally change the basic premise that a claimant is entitled to value associated with prospective planning permission and to seek to claim appropriate alternative development.

If you simply got rid of section 14, 17 and related sections, you would be left to rely on the basic valuation rule at rule 2 of section 5. *"The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold on the open market by a willing seller might be expected to realise."*

No doubt, caselaw would grow to establish what principles should be applied to assess value attributable to prospective planning permission and that it would be found that in the market hope value would at least be paid on some occasions.

So, in order to not take into account prospective planning permission at all, you would have to explicitly state that. You would have to be clear that the intention is to breach the principle of equivalence. You then start moving into the territories of human rights, proportionality and questions of public interest.

It may also be instructive to note that there was a short period where development value was nationalised between 1947 and 1959. Compensation was then based on existing use value with some limited scope for rebuilding. The Town and Country Planning Act 1947 established a tax system where the increase in value accrued from planning permission was taxed at 100%. However, by 1959 the system reverted back to the principles in the 1919 Act. Some of those citing reform now refer to this period and the ability to acquire property at existing use value. But it should be remembered that acquisition at existing use value during this period was set against the overall planning policy context in which it sat. No similar nationalisation of development rights generally is currently proposed. It may also be useful to note that the ECHR came into force in 1953 having been ratified by the UK in 1951 and with the Protocol to the ECHR formed in 1952. We are also therefore talking about a very early period in the understanding of the ECHR.

What are the issues driving the call for reform?

We have covered the current law, how it is currently interpreted and the constraints in amending it.

But what are the drivers in the calls for reform of the LCA 1961 and specifically section 14 and its related sections?

They can be summed up as follows:

- The need for delivery of large-scale housing. In particular, delivery of social housing.
- Ensuring that schemes pay for the infrastructure that is needed to support the delivery of that housing.
- Reducing the financial burden on the public purse.

I was fortunate enough to be privy to the consultation responses. Many of those responses are online to view on respective organisation's websites, and whilst of course I cannot provide details of those responses that have not been made public, I am at liberty to say one recurring theme was the delivery of sites for social housing and securing land at a value that made that possible.

What does that mean? It means that where a housing association or public body is looking to deliver a development with high levels of social housing, it is outbid by private developers who are looking to develop the land more profitably. They are able to pay more for the land than the housing association or authority might.

In its April 2022 "Unlocking Social Housing"[9] report, Shelter set out the following argument which I paraphrase, and I hope fairly. Land is the single biggest cost in building homes. It makes up to 70% of the cost of a new private home. If you can address the cost of land, you can make development cheaper and so build many more, better quality social homes. Without planning permission, land is worth very little and it is the act of developing the land that adds value. Subsidy for developing the land for social housing comes partly from central government but also locally from raised funds often through cross subsidy in building and selling private homes to support the development of social housing which is not acceptable. Reforming the Land Compensation Act 1961 will provide a means for authorities to acquire land at less cost in order to build out higher and better quality social housing.

I thought it may also be useful to share a video produced by Shelter about three years ago. [Video then shown: https://youtu.be/bnpu9bz7od0.]

But there is another issue. Certainty of the cost of the land as part of the development cost is an issue.

In a non-CPO scheme, the land cost is locked down through the acquisition of the land at a fixed price, or controlled through the framework put in place for the acquisition of the assembled land and the delivery of a value to the landowners. Other planning costs are locked down once the planning conditions are set, section 106 obligations defined or CIL contributions locked in. Yes, there remain variables in the development costs, but those are variables that exist for most developments.

In a CPO scheme, compensation is not certain at the point you get your CPO, or the point you start construction, or even potentially the point you have delivered. Risk on the cost of land is held with the scheme for a considerable time and sometimes the biggest elements of financial risk to a smaller project are held in land costs, particularly where there is the potential for alternative development ie where the quantity of land needed for a smaller project is proportionately high and may potentially be subject to development value.

Can a marginal scheme proceed with a CPO that has high levels of risk associated with key parts of its development cost? Is it right that schemes which should go ahead in the public interest simply cannot because the risk in delivering them is too great and the funding or guarantees cannot be found to cover that risk? Arguably those schemes with the greatest public interest, for example higher levels of social housing, are the hardest to get off the

[9] Unlocking_Social_Housing_-_Online_Report

ground. They rely on public subsidiary and to a degree, the public funding needs to know what the level of funding will be.

So, the argument goes that securing land at closer to or even land value capture will provide the ability to deliver the sites with higher levels of social housing and/or adequate levels of infrastructure to support development which is funded as much as possible by the development rather than with contributions from the public purse.

Whilst development does contribute to infrastructure improvements, most major infrastructure improvements require at least an element of support from the public purse to deliver at some point along the line.

What are the issues caused by the call for reform?

But removing compensation for value attributable to prospective planning permission has issues.

First, if an affected landowner does not feel that they will receive fair compensation, or even full compensation, it is more likely they will object to the scheme and therefore to the Order through which the scheme is being delivered. This ultimately increases the burden and risk associated with the consenting process to the promoter of the scheme. Many acquiring authorities are likely to want to pay market value for the land in order to reduce the number of objections to the scheme. In fact, in some cases, including in the Government's own major schemes, discretionary compensation policies already offer terms which are over and above the statutory regime in order to reduce the overall objections to the scheme. Whilst in theory it may seem attractive to capture this perceived value for the benefit of the scheme, when it comes down the hard politics of those affected and losses and anguish that may be suffered, the position might become very different.

Second, proportionality here is key. The public interest must be judged in paying compensation which is perceived as less than market value. Compulsory purchase is a broad church. It covers an array of circumstances from empty housing, to transport schemes, to major town centre regenerations. The public interest test may not exist in some situations, and where it does exist it may contain different justifications in one scenario to another. Therefore, not all situations will justify a lesser payment than market value, and where they might do, it may be for different reasons.

Third, and linked to the second point, proportionality and the public interest may dictate a lesser inroad to value in one situation than another. It is therefore hard to define a single solution or threshold across all situations.

Fourth, what happens at examination? The compulsory purchase process currently assumes fair compensation will be paid. It therefore does not feature in the decision making and matters for compensation are generally left to the Upper Tribunal, save possibly in relation to consideration of whether reasonable efforts to acquire have been made. What happens therefore if less than fair compensation is perceived as likely to be paid? Does the compelling case in the public interest test for confirming a CPO become harder? Does it make it less likely a CPO will be secured at all?

Fifth, part of the issue is certainty over costs for a development. How can you make sure that any process provides a sufficient level of certainty over those costs that will enable the scheme to decide to go forward with the CPO in the first place?

Sixth, the issues are not just about land value. Land value is only one part of the equation in determining an overall compensation package. Other losses are taken into account through

heads such as disturbance and severance. You might reduce or provide certainty that the cost in purchasing the land will be let's say existing use value, but if you are taking greenfield land being farmed, what is the effect you are having on the farming business that you are interfering with? You cannot simply draw a line on a map and assume your only compensation costs will be the cost of the land at existing use value.

Seventh, the creation of a two-tier market. One within the CPO and one outside. If a perceived less than market value is being paid within the CPO boundary, those outside will be lucky enough to be excluded from it, and may even benefit off the back of the scheme through further ancillary development. However, it may be argued that two-tier systems already operate with a different compensation structure operating for those within, than may be expected for those outside whether for the benefit of those inside or outside.

No doubt others could add to this list, but for today's purposes I will stop there.

Consultation proposal

So, how are the Government looking to address all of these competing interests and constraints in seeking to achieve their policy objectives? In their consultation last summer, it proposed introducing the ability for an authority to apply for directions to be able to pay something closer to or at existing use value.

What are the advantages of such an approach?

First, it would be an opt in so only schemes that sought to be within such a regime would be. All other schemes would remain subject to the usual rules.

It would further mean that individual schemes are assessed on the relative public interest of the merit in limiting compensation for the value of prospective planning permission. The robustness of the evaluation would therefore be more likely to stand up to challenge.

The actual threshold could be applied individually against the scheme, its requirements and those relative public interest merits. It would therefore produce a proportionate result.

It would further provide a level of certainty over land costs in advance of deciding whether to proceed with the development. It will help in securing necessary financing that may be needed to support the development.

But what are the disadvantages of such an approach?

I have already set out some generic disadvantages in pursuing a policy of paying less than the perceived market value so I will not repeat those. They will apply to any system that is put in place whereby less than the perceived market value is paid. What therefore are the unique disadvantages to a directions system?

Whilst opt-in has the benefit of not applying universally to all schemes or to a group of type of schemes, it means that the relevant acquiring authority does have to opt in and face the challenges of doing so. It would effectively involve a preliminary examination process before the CPO itself is made and examined. Given some costs would be involved in that, the relative advantages of pursuing that opt in against the costs of achieving a direction would need to be evaluated.

It may involve some delay to the overall delivery of the scheme, schemes will need to go through the directions process before then going through the CPO process. However, what we are discussing here are schemes that are already struggling to come forward. They might not otherwise come forward without this mechanism. Therefore, the process may be longer

overall than a normal project involving a CPO, but it may actually mean delivery of the scheme as opposed to no delivery at all.

But what are those public interest considerations?

Part of the consultation in the summer was aimed at trying to draw out where it was felt there may be public interest in adopting this policy. Should it be universal for all types of project involving compulsory purchase (including TWAOs and DCOs)? What if a private developer is involved in whatever form that takes and is taking a profit from the scheme? What is the relative public interest in trying to cap compensation where it is a fully capital funded scheme from a public authority source?

Whilst we do not have a response from the government yet on their consultation last summer, it is certainly true that the main area of interest for this is housing and in particular social housing. And again, whilst we do not have any government amendments to the Levelling-up and Regeneration Bill yet, we do have a clause proposal as an amendment from the Labour benches. It broadly follows the government proposal but sets out what it views as the public interest here. In a little more detail, the clause:

- Allows a public authority to apply to the Secretary of State for a direction that the value of land which is subject to a specified scheme for the construction of or redevelopment for social rent housing is to be determined on the assumption that there is no prospect of appropriate alternative development within the meaning of that in its new place in section 17 Land Compensation Act 1961.
- It sets out that the ground for the making the direction is that the acquisition of the relevant land will enable the authority to alleviate homelessness and housing need in its area by the provision of social rent housing, and in particular to the number of households registered on the authority's waiting list for an allocation of social housing, and it should be assumed that a scheme whose primary purpose is to provide housing for social rent is for the public benefit.

What the clause does not appear to do is limit the assessment of prospective planning permission under section 14(2)(b), only appropriate alternative development as redefined in the Bill under section 17.

One further issue is a change in plans by an authority away from the original scheme. What do I mean by that? An authority gets a direction capping value for prospective planning permission based on the proposed scheme and its perceived public benefit. We will call it Scheme A. It then makes and gets confirmation of a CPO based on Scheme A. But circumstances change and the authority is no longer able to implement the original Scheme A. It redesigns the scheme into a variation, Scheme B, which has less perceived public benefit. But the direction and the CPO is still in place and the authority either has or still could implement acquisition under the terms of the direction capping value. Is that fair?

You may recall that we previously had provisions for the payment of additional compensation if the acquiring authority got planning permission for additional development within 10 years of the acquisition date. Namely, development that went beyond the purposes for which the land was originally acquired. Those provisions were repealed by the Neighbourhood Planning Act 2017 on the basis that the landowner had been adequately compensated at the time for their loss. If there had been a prospect of alternative development at the time then they would be compensated for it, but they shouldn't gain off the back of the public investment that may make another alternative development possible, that would not otherwise have been possible.

But here the proposal is to attempt to limit the compensation payable in the first place based on the proposed scheme. If that scheme changes, surely we then need to re-evaluate what that compensation should be?

Assessment of land value in viability assessments

Before proceeding to look at other possible reforms in this area, I want to turn to look at what is meant by the some of the terms that are used in assessing land value. There is perhaps something to gain from looking at the context of viability assessments.

They also have to grapple with the issue of land values, and what should have been paid for the land, not what was actually paid for the land. The argument there is that a landowner should not be allowed to benefit from its bad deal to pay above market price by reducing the planning gain contributions it makes in assessing the viability of a development.

The Government's viability assessment guidance talks about establishing a benchmark land value on the basis of existing use value, plus a premium for the landowner. It goes on to say:

"The premium for the landowner should reflect the minimum return at which it is considered a reasonable landowner would be willing to sell their land. The premium should provide a reasonable incentive, in comparison with other options available, for the landowner to sell land for development while allowing a sufficient contribution to fully comply with policy requirements. Landowners and site purchasers should consider policy requirements when agreeing land transactions. This approach is often called existing use value 'plus'."[10]

After expanding on this further, it then goes on to talk about whether alternative uses can be used in establishing benchmark land value. It sets out that alternative use value can be used to establish benchmark land value but only where it is limited to those uses which would be fully compliant with up-to-date development plan policies. It confirms that if alternative use value is used then it includes the premium payable to the landowner, so that is not double counted.

Whilst this is similar to terminology used in compulsory purchase it is not the same. Compulsory purchase allows compensation for the value of the land to be assessed as: existing use value (excluding the value of the scheme); or alternative use value (whether through extant planning permission, hope value or appropriate alternative development).

You do not assess compulsory purchase compensation on the basis of existing use value plus. We are therefore already in a world where someone's land may be valued differently inside the scheme to outside in relation to housing. Outside a CPO scheme, if land is being brought forward for housing you might expect an incentive payment for agreeing to bring that land forward for that housing. Inside a CPO scheme, you will not get any value attributable to the scheme. To gain any 'plus' a landowner subject to compulsory purchase must look to alternative use than that of the scheme. Is that right?

Proponents of the removal of hope value talk about being prepared to pay existing use value plus as an incentive to bringing the land forward. I would venture to say one of the problems with current compulsory purchase compensation is that it does not allow for that possibility.

[10] https://www.gov.uk/guidance/viability

Other possibilities

Let's explore the reasoning behind that in more detail. It relates to the no-scheme principle, another ancient principle in compulsory purchase developed through caselaw and most recently codified in the Neighbourhood Planning Act 2017.

As the Land Clauses Consolidation Act 1845 came to be interpreted, the loose term "value" in that Act was interpreted as the value to the owner and not the acquiring authority. This was tempered in the famous case of *Point Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 where the value of the land was enhanced by the acquiring's authority's use of the land. The Privy Council held that it was necessary to disregard value attributable to the scheme underlying the acquisition. Subsequently, the same principle was applied where the scheme had a negative effect on the value of the land as can often be the case, particularly where the scheme has a generalising blight effect on an area for a period.

This makes sense. Firstly, the acquiring authority should not benefit from a reduction in value to land that it causes as a consequence of the scheme's existence. Secondly, the landowner should not benefit from, in many cases, the public investment being put into the land and for that public investment to be made larger because of the proposal to make that public investment and a subsequent increase in the value of land generally in an area. To that extent the law of compulsory purchase compensation is already firm in discounting additional value arising from the scheme and pushing the value back to existing use. It also already creates a two-tier system where those inside the red line are not able to benefit from the scheme value, whereas those outside can.

But this is not how the acquisition of land for housing schemes work in the real world. A housing scheme generally does acknowledge an incentive for a landowner to bring land forward or a share of the profits from the development of the land. So in the non-CPO world there is talk of existing use plus, in the CPO world only talk of existing use. A landowner in the CPO world therefore looks to alternative use value to make something above existing use value because they are not being offered anything in the scheme world. What would happen if the landowner had been offered existing use value plus in the CPO world? Would they have accepted that as satisfactory and not looked further towards alternative use value?

Should we in fact consider whether in certain cases that there is an advantage in attributing some scheme value to a landowner? Perhaps in certain instances, particularly new housing, we should reverse the current rules such that the no-scheme rule is disapplied and landowners are attributed a value associated with the scheme. It might go further to limit their alternative options to the scheme to ensure certainty to the scheme developer in the price they pay. The landowner would receive a value above existing use value. It might not be completely what the landowner may have got if they had taken on the risk of securing planning permission themselves and then developing it out, but it would include a share of the scheme value. A scheme could work within itself if it knows the value to be paid for the land (over and above existing use value) will be one that reflects the profits of the scheme itself.

Is that fair compensation? Would it also reduce the number of compensation disputes when looking at compensation under section 14 if landowners felt satisfied they were getting something above existing use value for the release of their land?

The other key aspect for authorities is a level of certainty over costs in being able to bring the scheme forward. This is not just housing schemes. I have schemes where uncertainty on potential development value on land has prevented schemes from proceeding, particular smaller schemes where the proportion of land costs to overall project costs can be greater as a percentage. As compensation is not assessed until later, that potential development value

needs to be funded as a risk, whether or not it eventually materialises. So, you have a public project, perceived to be in the public interest, held up because the authority has sufficient uncertainty over funding for it to make it either unaffordable or impossible to secure third party funding against. When I say third party funding, I particularly mean central Government funding. It's much more attractive to fund a project which has certainty around its costs, than one with higher levels of uncertainty. The Government wants to know money it is allocating to a project is going to be spent, not allocating millions of pounds in risk that might not be spent and could have funded another project.

So how can we lock down whether land does or does not have hope or development value associated with it earlier in the process? We do not necessarily need to determine the exact value of the land, simply the principles of what we are talking about in connection with that land. A more educated and credible property cost estimate can then be made, removing key risk elements associated with the cost of land and making funding of a scheme more certain.

As matters stand in compensation law, the valuation date is the date on which the acquisition is made which is after the compulsory purchase powers are exercised. This means in theory that circumstances cannot be fully assessed until the valuation date is hit. But can an earlier date be locked in for the purposes of assessing development value?

What could be the options?

Could an acquiring authority provide notice of its intention around a scheme and lock in the development potential for alternative uses at that date? Any question as to the development potential for alternative uses of that land could then be assessed at an earlier point in time.

Use of early independent valuations. A topic that was on the agenda a few years ago, but has perhaps slipped off it. The aim is to give both parties earlier certainty of the likely value that would be paid for the land and to assist in reaching voluntary agreements avoiding use of CPO. Could this assist in bringing parties closer together on value at an earlier point in time or even provide binding valuations?

Are there other proposals that could be adopted to give greater certainty on value, particularly on whether alternative use would be possible?

I will close here because I have spoken for sufficiently long. These are complex questions around land use balancing the public interest against private rights. That balance is constantly changing as public needs change. As land use becomes more intensified and available land for development becomes scarcer, these issues will only become more difficult. I hope I have contributed in a small part to the debate and look forward to seeing what happens in this space over the coming days, months and years.