The no scheme principle and rules:

S. 6A of the Neighbourhood Planning Act 2017

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Introduction

1. The law of compensation for compulsory purchase is frequently complex and often lacking in clarity. Of the many complexities, few have proved as difficult to operate and as the "no scheme world" hypothesis. Simple in conception, it has proved remarkably tricky in its application. The Government has at long last thought to tackle this, though at some remove from the Law Commission's thorough consideration of the issue. These changes, made in the Neighbourhood Planning Act 2017, mainly came into force on 22 September 2017 (that date of writing of this paper).

2. The Law Commission (in its consultation paper and final reports which Government largely ignored at the time[1]) wrote in its Consultation Paper **Towards a Compulsory Purchase Code (1): Compensation** (2002, Consultation Paper No 165)[2]:

> "It is an established principle of compensation law that compensation "cannot include an increase in value which is entirely due to the scheme underlying the acquisition." This rule, following the name of the case from which this formulation is taken, is often called the "*Pointe Gourde* rule"[3]. The rule requires the disregard of decreases in value caused by the scheme, as well as increases in value. In other words, the value must be assessed "upon a consideration of the state of affairs which would have existed, if there had been no scheme of acquisition".
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> Although the rule was developed by the courts, its effect has been reproduced, or reflected, in a number of provisions now contained in the Land Compensation Act 1961. They are sections 5(3) ("special suitability"); section 6 (disregard of changes in value due to actual and prospective development); section 9 (depreciation due to prospect of acquisition); sections 14-16 (planning assumptions); and section 17ff (certificates of appropriate alternative development).
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> **The concept**

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[1] www.lawcom.gov.uk/project/towards-a-compulsory-purchase-code/. Note that the provision in the 2017 Act draw to some extent on the draft Code drafted by the Law Commission though see the comments in the Government's Response to Consultation.

[2] See the CP Section 6.

[3] ***Pointe Gourde Quarrying & Transport Co v. Sub-Intendent of Crown Lands*** [1947] AC 565 at 572, per Lord MacDermott. See also ***Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagapatam*** [1939] AC 302.

> The concept is reasonably simple. For example, a railway scheme may cause blight and reduced land values while it is being planned and constructed. Conversely, the prospect of its use once completed will give the land enhanced value to the promoter (as compared to its existing use value), and may also result in higher land values in the area, for example near new stations. The no-scheme rule says that land acquired by the authority for the project should be bought at values which reflect neither the blight nor the enhancement. The rule was originally developed by the Courts in the 19th century, as part of the principle that compensation should be based on the "value to the owner", rather than its value for the promoter's scheme. This was relatively easy to apply in the early cases where the increased value depended on the use of statutory powers only available to the promoter, and where the enabling statute usually defined the scope of the project. However, this simple model was not readily adapted to the more complex schemes, and more general statutory powers, which became the norm in the last century, particularly following the radical reform of the planning system in 1947. After 150 years of evolution, the present law is a complex mixture of statutory and common law rules, with many unresolved conflicts and inconsistencies."

3. The Report **Towards A Compulsory Purchase Code: (1) Compensation** (Law Com No. 286, December 2003) ("**LCR**") described the issue at para. 7.1 as -

> "the most difficult subject we have had to address in this project: the complex and intractable problems arising from the so called *Pointe Gourde* (or "no-scheme") rule."

See also, among many case references to the issues, Lord Nicholls in ***Waters v. Welsh Development Agency*** [2004] 1 WLR 1304 and the Tribunal in ***Pentrehobyn Trustees v. National Assembly for Wales*** [2003] RVR 140.

4. In ***Waters***, Lord Nicholls reviewed the authorities in the context of the provisions of the 1961 Act (which are to be repealed by the 2017 Act) and explained the position as follows:

> "17 On an arm's length sale in the open market a seller would normally expect to realise any enhanced value possessed by the land because its location makes it specially valuable to a particular buyer or class of buyers. The land might have particular attraction, and therefore value, to an adjoining landowner. Or the land might be particularly adaptable for a certain purpose. …
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> 18 In principle, subject to one qualification, this approach is equally applicable when assessing value for the purposes of compensation. It is this qualification which has given rise to difficulty. The qualification is that enhancement in the value of the land attributable solely to the particular purpose for which it is being compulsorily acquired, and an acquiring authority's pressing need of the land for that purpose, are to be disregarded. ... When granting a power to acquire land compulsorily for a particular purpose Parliament cannot have intended thereby to increase the value of the subject land. Parliament cannot have intended that the acquiring authority should pay as compensation a larger amount than the owner could reasonably have obtained for his land in the absence of the power…
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> 19 This approach is encapsulated in the time-hallowed pithy, if imprecise, phrase that value in this context means value to the owner, not value to the purchaser. In *Stebbing v Metropolitan Board of Works* (1870) LR 6 QB 37, 42, the graveyards case, Cockburn CJ said:
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> > "When Parliament gives compulsory powers, and provides that compensation shall be made to the person from whom property is taken, for the loss that he sustains, it is intended that he shall be compensated to the extent of his loss; and that his loss shall be tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it."
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> …
> 21 Drawing a distinction between value to the owner and value to the purchaser makes it

> necessary to distinguish the one from the other. It is necessary to separate from the market value of land any enhancement in value attributable solely to the presence of the acquiring authority in the market as a purchaser of the land in exercise of its statutory powers. It is important to recognise that, for this purpose, it is not the existence of a power of compulsory acquisition which increases the value of land. What is relevant, because this may affect the value of the land, is the use the acquiring authority proposes to make of the land it is acquiring. Accordingly, in identifying any enhanced value which must be disregarded it is always necessary to look beyond the mere existence of the power of compulsory purchase. It is necessary to identify the use proposed to be made of the land under the scheme for which the land is being taken. Hence the introduction of the concept of the "scheme" or equivalent expressions such as project or undertaking."
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> "36 … Potentiality is part of the market value of land and must be taken into account when assessing compensation. Potentiality should be valued even if the only likely purchaser is the acquiring authority itself. That was decided in the *Indian* case[4]. But market value does not include enhanced value attributable solely to the particular use proposed to be made of the land under a scheme of which compulsory acquisition of the subject land is an integral part. This element of value is not part of market value because it is not an element the owner could have realised in the open market. That is the traditional view, which has long been acted upon in this country. It is much too late now for judicial interpretation to set the law on an altogether different course, even if that were otherwise appropriate. Potentiality is to be assessed and valued as matters stood before the particular scheme, of which the subject land's acquisition is part, came into being."

5. Lord Nicholls observed that the no-scheme principle based on "value to owner" encompasses at common law more than the value of the subject land itself:

> "41 … The "value to the owner" principle is apt to embrace enhanced value arising from the proposed use of the subject land and also enhanced value arising from the use made or proposed to be made of other land also being acquired. The *Pointe Gourde* case concerned enhanced value arising from the proposed use of other land. But, not surprisingly, Lord MacDermott's much quoted observation in the *Pointe Gourde* case refers to the applicable principle in terms covering both sources of enhanced value. Lord MacDermott said, in quite general terms, that "compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition": *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565, 572.
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> 42 In consequence, the phrase "the *Pointe Gourde* principle" is often used as a compendious reference covering both types of cases. This can be confusing. It is important to keep in mind that, despite its late arrival on the scene, the expression "the *Pointe Gourde* principle" is not a reference to a principle separate and distinct from the "value to the owner" principle. It is no more than the name given to one aspect of the long established "value to the owner" principle. …
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> 43 Notoriously the practical difficulty with the Pointe Gourde principle lies in identifying the area of the "scheme" in question…"

6. Lord Nicholls held that the statutory code relating to the no-scheme principles in s. 6 and Schedule 1 to the 1961 Act was not exhaustive:

> "51 The first and most obvious oddity of this enactment is that it makes no provision regarding value attributable to the prospect of development of the subject land itself. It is frankly impossible to believe that Parliament intended that enhancement of value attributable to the prospect of development of associated land should be disregarded but not enhancement in value attributable to the prospect of development of the subject land itself. The statutory

[4] ***Raja Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam*** [1939] AC 302 (PC).

> assumptions regarding planning permissions in respect of the subject land, set out in sections 14 to 16, do not provide an adequate explanation for this difference in treatment. Planning permission is one thing, the prospect of development is another.
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> 52 In *Viscount Camrose v Basingstoke Corpn* [1966] 1 WLR 1100, the Court of Appeal rightly declined to accept that Parliament intended this result. A possible explanation for the absence of a statutory disregard in respect of enhanced value attributable to proposed development of the subject land itself is that, as already noted, in such cases the difficulties inherent in identifying the ambit of the scheme do not arise. This being so, the exclusion of these cases from the scope of the statutory disregard is not to be construed as implicitly changing the law. Rather it is the recognition of a well known situation for which legislation was not necessary: see Russell LJ, at p 1111. Accordingly, in these cases the Pointe Gourde principle should continue to be applied.
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> 53 Had the matter rested there section 6 might well have been open to the interpretation that in all other respects the new statutory code was exhaustive. But there is at least one further gaping lacuna in the code. This is illustrated by *Wilson v Liverpool Corpn* [1971] 1 WLR 302, where an authority acquired some of the land needed for a scheme of development by agreement and made a compulsory purchase order in respect of the remainder. Enhancement in value of the subject land attributable to the development of the land bought by agreement would be outside case 1. Here again, that cannot have been intended by Parliament.
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> 54 The courts therefore found themselves driven to conclude that the statutory code is not exhaustive and that the *Pointe Gourde* principle still applies. This conclusion is open to the criticism that in many instances this makes the statutory provisions otiose. This is so, but this is less repugnant as an interpretation of the Act than the alternative."

7. The Law Commission summarised criticisms of s. 6 of the 1961 Act:

> D.58 … section 6 (with the First Schedule) has been subject to particular criticism: the convoluted wording was difficult to interpret; the section applied to "other land", but made no equivalent provision for the subject land; and the statute failed to indicate whether or not the new rules were intended as a complete no-scheme code, or simply as a supplement to the judicial rule."

8. Other issues have arisen, summarised (at least as at 2003) in LCR at §7.13, including the extent to which the no-scheme assumption leads to the need to reconstruct the planning history of the acquired land: see the discussion of the "cancellation assumption" and s. 17 of the 1961 Act in ***Fletcher Estates v. Secretary of State*** [2000] 2 AC 307, applied most recently in ***Boland v Bridgend CBC*** [2017] R.V.R. 243. At pp. 322-3 of ***Fletcher Estates*** Lord Hope held:

> "The critical words in the subsection to which attention must be directed are to be found in the phrase "if it were not proposed to be acquired." Those words must be examined in the light of the agreed fact that the relevant date, as at which the local planning authority is required by the subsection to issue its opinion regarding the grant of planning permission, is the date of the section 22(2)(a) notice. The language is… not of the past but of the present conditional. The assumption which has to be made is that the land is not "proposed to be acquired" at the relevant date. The words "proposed to be acquired" are given a particular meaning by the statute. They appear in section 17(1) which identifies the time when the parties may apply for a certificate of alternative development, and they appear again in section 17(3) which describes the contents of the application for a certificate. The circumstances in which an interest in land shall be taken to be an interest proposed to be acquired: are defined in section 22(2). It is by reference to the circumstances defined in section 22(2) that the relevant date for the determination of the issue about planning permission is identified. The effect of that subsection is that an interest in land cannot be

taken to be an interest proposed to be acquired for the purposes of section 17 until one or other of the circumstances which it describes has occurred.

The position appears therefore to be quite straightforward upon a consideration of the ordinary meaning of the words used in the statute. The assumption which the local planning authority must make relates to the situation as at the relevant date. The scheme for which the land is proposed to be acquired, together with the underlying proposal which may appear in any of the planning documents, must be assumed on that date to have been cancelled. No assumption has to be made as to may or may not have happened in the past …

It is one thing to examine these factors[5], on the assumption that the proposal has been cancelled on the relevant date, in the light of existing circumstances. It is quite another to look back into the past and to try to reconstruct the planning history of the area on the assumption that the proposal had never come into existence at all. The further back in time one goes, the more likely it is that one assumption as to what would have happened must follow on another and the more difficult it is likely to be to reach a conclusion in which anybody can have confidence."

9. In ***Boland***, the issue of what the planning consequences were of the cancellation assumption came under close scrutiny since the issue was whether the redrawing of a settlement boundary was part of the underlying scheme. Summarising the Court of Appeal's conclusions, Hickinbottom LJ held at [42]"

"42 However:

i) Whether a policy falls within the "underlying proposal" of a scheme is essentially a question of fact for the relevant decision-maker (in this case, the Upper Tribunal) to determine. It is a question of fact and planning judgment. The observations of Lord Nicholls of Birkenhead in *Waters v Welsh Development Authority* [2004] UKHL 19; [2004] 1 WLR 1304 at [55] and following (especially at [61]), on how the underlying scheme should be identified for the purposes of the assessment of compensation under Part II , with which the rest of the House agreed, are equally apposite here. In respect of matters involving planning judgment, the Lands Chamber of the Upper Tribunal has particular expertise and experience.

ii) However, the construction of the policy itself is, of course, a matter of law. That applies to a development plan, as much as to national policy.

iii) In the Bridgend UDP, the settlement boundary has broad policy significance, in the sense that different policies apply to land inside that boundary from the policies that apply to land outside. Generally (and subject to the Policy EV1 caveat in respect of land outside the settlement boundary allocated to a particular use by other specific policies), Policy EV12 proscribes development outside settlement boundaries. Inside the boundary, development is acceptable in principle, the circumstances in which development will be allowed being assessed by reference to criteria-based policies, including Policy H4.

iv) The settlement boundary is tested through the rigorous statutory process that development plans involve, which includes consultation and independent examination. The incorporation of settlement boundaries into the development plan has substantial significance, given that applications for planning permission or for the renewal of planning permission are to be determined in accordance with the approved or adopted development plan for the area, unless material considerations indicate otherwise ...

v) In this case, as Ms Gandy accepted in evidence … there was nothing in the development plan to suggest that the significance of the settlement boundary to the west of Pen-y-fai, once re-drawn, was any different from the broad policy significance to which I have referred. … other than Policy SC5(15), there are no specific policies in the plan that restrict the use of the

[5] Ones relevant to planning decisions "such as predictions of population growth and the availability of suitable land for development affect the need for more land to be released for housing in the area…"

> Boland Land and the North Field, now enclosed by the boundary.
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> …
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> viii) However, in this case, the re-drawing of the settlement boundary to the west of Pen-y-fai was such as to include the North Field within the settlement, which re-drawing, … was not part of the underlying scheme, in the sense that the North Field could have been developed with (e.g.) housing under the within-settlement Policy H4 even if the new school scheme did not go ahead.
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> …
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> x) … Whether the boundary drawn around the Reference Land was such as to comprise part of the underlying scheme was a matter of fact for the Upper Tribunal, using their planning judgment, as I have described.
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> xi) I do not consider that the tribunal erred in law in their approach to that issue. In paragraph 36 of their decision, they properly acknowledged that the redrawing of the settlement boundary to include the Boland Land and the North Field was prompted by the proposal for a new school. That that re-draw was not necessary for the proposal to comply with the policies of the (then emerging) UDP was also, in my view, a material consideration. There is nothing in the decision to suggest that the tribunal considered that that was, in itself, determinative – otherwise the decision would no doubt have been somewhat shorter – and I reject the contention, insofar as it was made, that the weight the tribunal gave to that matter was excessive as a matter of law.
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> xii) Importantly, in my view, the tribunal focused upon the development plan itself; and noted that it did not contain any policies that restricted development in any part of the land "taken into" the settlement (i.e. the Reference land, the Northern Boland Land and the North Field). If the development plan had intended the restriction for which it now contends, it could easily have made clear provision for it. In the event, it made no provision. In the circumstances, the Upper Tribunal was entitled to conclude that, as a matter of fact, the policy that re-drew the settlement boundary was not a part of the underlying scheme…"

10. As set out below, the language of cancellation is brought into s. 6A via the new Rule 1 (s. 6A(4)). The implication is that cancellation does not require wholesale rewriting of the planning history of the site, though this is now the subject of the planning assumptions in s. 14 of the 1961 Act as amended by the Localism Act 2011.

11. The recent Supreme Court judgment in ***JS Bloor (Wilmslow) Ltd v. Homes & Communities Agency*** [2017] 2 P. & C.R. 5 concerned compensation for compulsory acquisition which raised questions concerning the existing "no-scheme" rule in the 1961 Act (together with case law), in particular the relationship between the general provisions for the disregard of the scheme and the more specific provisions relating to planning assumptions.

12. Lord Carnwath gave the judgment of the Supreme Court and stated at paras. 9-10:

> "9. The rule has given rise to substantial controversy and difficulty in practice. In *Waters v Welsh Development Agency* [2004] 1 WLR 1304, … para 2 ("*Waters*"), Lord Nicholls of Birkenhead spoke of the law as "fraught with complexity and obscurity". In a report in 2003 the Law Commission conducted a detailed review of the history of the rule and the relevant jurisprudence, and made recommendations for the replacement of the existing rules by a comprehensive statutory code (Towards a Compulsory Purchase Code (1) Compensation Law Com No 286 (Cm 6071)). Since that report aspects of the rule have been subject to authoritative exposition by the House of Lords in *Waters* itself, and more recently in *Transport for London v Spirerose Ltd* [2009] 1 WLR 1797; [2009] UKHL 44 ("*Spirerose*").
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> 10. Although the Law Commission's recommendations for a complete new code were not

> adopted by government, limited amendments to the 1961 Act in line with their recommendations were made by the Localism Act 2011 section 232 (relating to planning assumptions). Further proposed amendments, dealing with the no-scheme principle more generally, are currently before Parliament in the Neighbourhood Planning Bill 2016-17. The purpose of the latter is said to be that of "clarify[ing] the principles and assumptions for the 'no-scheme world', taking into account the case law and judicial comment" (Explanatory Notes para 70). The present appeal falls to be decided by reference to the 1961 Act as it stood before the 2011 amendments."

13. In his conclusion, Lord Carnwath commented on the present complexity, and hoped that the Bill's reforms would be approved:

> "43. The Upper Tribunal's decision in the present case is a powerful illustration of the potential complexities generated by the 1961 Act in its unamended form. It is to be hoped that the amendments currently before Parliament will be approved, and that taken with the 2011 amendments they will have their desired effect of simplifying the exercise for the future. It is no criticism of the tribunal if parts of their reasoning may appear obscure at first sight and require some unpicking. However, once that is done, I am satisfied that the criticisms made by the Court of Appeal and in this court by the respondents are misplaced. Overall, the tribunal's application of these difficult provisions to the complex facts of this case is in my view exemplary. I find no error of law."

14. The planning assumptions, which form part of the complex series of considerations which are involved in the hypotheses to be applied to the assessment of compensation, found in the original version of ss. 14 to 17 of the 1961 Act, were substantially amended by the Localism Act 2011. The new provisions take the reform a step further.

The 2017 Act: a brief history

15. The Neighbourhood Planning Act, completed its Parliamentary "ping pong" on 26 April 2017[6], received Royal Assent on 27 April 2017 and contains a number of wide-ranging for the planning and compulsory purchase system. These follow the changes made in Part 7 of the Housing and Planning Act 2016. The CPO and compensation provisions (other than the powers for the making of regulations) come into force on a date to be appointed: s. 46(1).

16. The Government consulted on compulsory purchase reforms in the first half of 2016, and seeks to implement those reforms in Part 2 of the Act[7]. The CPO provisions apply to England and Wales only.

17. The compulsory purchase provisions passed through the Committee Stage in the House of Commons (October 2016) with only some probing amendments to clarify technical matters. At the Report Stage, technical amendments were introduced by the Government, and a few substantive amendments were tabled but not called. The Third Reading in the Commons passed without much comment on the CPO provisions, other than the Shadow Communities Secretary signalling the Opposition's support for the amendments and their

[6] See http://services.parliament.uk/bills/2016-17/neighbourhoodplanning.html

[7] www.gov.uk/government/consultations/further-reform-of-the-compulsory-purchase-system

desire for a "full-scale review of CPO legislation".

18. The only substantial changes to the CPO provisions occurred when the Bill reached the House of Lords. A substantial proportion of the Lords' amendments were directed at the CPO provisions. All of the many amendments proposed by the Lords were agreed to by the House of Commons and, as a result, the most recent consideration of the Bill by the Lords on 26 April 2017 was concerned with matters other than the CPO provisions.

19. Royal Assent was given on 27 April 2017.

20. The first commencement order (the Neighbourhood Planning Act 2017 (Commencement No. 1) Regulations 2017 SI No 767) came into force on 18.7.17 and dealt largely with planning matters and the regulation making power for reinstatement following temporary possession.

21. The second order which was made on 21.9.17 (the Neighbourhood Planning Act 2017 (Commencement No. 2) Regulations 2017 SI No 936) brings into force on 22.9.17 the main CPO provisions including s. 32 which amends the no scheme rule provisions and substitutes the new ss. 6A to 6E of the 1961 Act. There are transitional provisions in reg. 4 which apply the new rules only to CPOs authorised on or after 22.10.17, meaning confirmed on or after that date, a ministerial CPO made on or after that date, a TWA Order determined under s. 13(1) on or after that date, or compulsory powers in legislation enacted (presumably meaning received Royal Assent) or after that date (and similarly with other comparable powers).

22. The Government announced on 22.9.17 further reforms to speed up the CPO system including a new standard claim for compensation[8]. The CPO Guidance 2015 appears to remain unchanged.

New rules

23. In the light of the major changes to the "no-scheme world" rules, and the *apparent* intention to replace the common law and statutory rules (see below) with a new self-contained statutory code, the Explanatory Notes drafted when the Bill moved from the Commons to the Lords in December 2016[9] curiously state:

> "9. Following the reforms introduced by the Housing and Planning Act 2016, the Bill makes further changes to the law on compulsory purchase. It will seek to do this by clarifying the statutory framework for compensation, which will not affect the fundamental principles on which it is assessed."

24. The explanation for the new provisions is found in the Government's Consultation

[8] www.gov.uk/government/publications/compulsory-purchase-process-and-the-crichel-down-rules-guidance

[9] The official ENs for the Act were not available at the time of writing.

Response (Sept 2016)[10]:

> "7. A core principle of compulsory purchase compensation is that land should be acquired at market value in the absence of the scheme underlying the compulsory purchase. Since the principle was first established, over a century of case law has sought to clarify the basis upon which the land valuation in these circumstances is calculated, based around the principle of what is known as the 'no scheme world'.
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> 8. The 'no scheme world' principle has, however, been interpreted in a number of complex and often contradictory ways. This lack of clarity may make it very difficult to establish the basis for calculating market value in some cases and causes significant delays and uncertainty in the determination of compensation.
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> 9. The consultation sought views on proposals to establish the principle of the 'no scheme world' fairly and effectively in the valuation process by codifying it in statute and introducing a:
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> - clearer definition of the project or scheme that should be disregarded in assessing value
> - clearer basis for assessing whether the project forms part of a larger 'underlying' scheme that should also be disregarded
> - more consistent approach to the date on which the project is assumed to be cancelled
> - broadening of the definition of the 'scheme' to allow the identification of specified transport infrastructure projects that are to be disregarded within a defined area, over a defined period of time"

25. Support was high, and so the Consultation Response stated that provisions would be included in the Bill:

> "20. The government welcomes the strong support for this proposal. We acknowledge that extending the definition of 'the scheme' to exclude specified transport infrastructure may result in claimants receiving less compensation than they might otherwise have done. However, we believe it is right that the public purse, rather than private interests, should benefit from increases in land values arising from public investment.
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> 21. The government will therefore, take forward the proposal to codify the 'no scheme world' valuation principle in legislation. In doing so we will take account of the points raised by providing appropriate safeguards to limit the scope of this power. We will base the drafting on the Law Commission's Rule 13. We note that while there was overall support for the proposal to use the launch date instead of the valuation date as the date on which the scheme is assumed to be cancelled, a number of expert practitioners were opposed. After further careful consideration, we have decided to follow the Law Commission's suggestion that the valuation date should be used as the cancellation date. We have been persuaded that although in valuation terms a launch date cancellation is appropriate for planning assumptions it would be better to establish the valuation date as the statutory cancellation date because this would reflect what is currently happening in practice. Using the valuation date will have the benefit of avoiding potential disputes, with the associated delays and costs, over what might or might not have happened in the period between the launch date and the valuation date and meet our objectives for a clearer and fairer system.
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> 22. We will also take forward the proposal to extend the definition of 'the scheme' to include relevant transport infrastructure projects subject to safeguards to ensure a direct link to "the scheme". We note the support for extending the definition further to include other types of

[10] www.gov.uk/government/uploads/system/uploads/attachment_data/file/551059/CPO_Phase_2_reform_govt_response.pdf

> infrastructure project. However, on balance, we consider that as transport infrastructure projects have the most discernible impact on land values, the proposal to extend the definition of 'the scheme' should be limited to those types of infrastructure project."

26. The Explanatory Notes published with the Act state:

> "**Section 32: No-scheme principle**
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> 106 Compensation for land taken by compulsory purchase is assessed in the "no-scheme world". This assumes that the scheme underlying the compulsory purchase was cancelled on the valuation date (the date of entry and taking possession of the land – if not agreed earlier). Compensation for interests in land is its open market value in the "no-scheme world", disregarding both any increase or decrease in the value of the land which is solely attributable to the particular purpose for which it is acquired, and the acquiring authority's need for the land for that purpose.
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> 107 The principles and assumptions concerning the no-scheme world and the extent of the scheme to be disregarded are mainly to be found in sections 6 to 9 of the Land Compensation Act 1961 ('1961 Act') and around 100 years of case law on these provisions and their predecessors.
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> 108 This section clarifies the principles and assumptions for the "no-scheme world", taking into account the case law and judicial comment.
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> 109 Subsection (3) inserts new sections 6A to 6E to replace sections 6 to 9 of the 1961 Act.
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> 110 New Section 6A sets out the 'no scheme principle' that any increases or decreases in value of land caused by the scheme or by the prospect of that scheme must be disregarded in valuing the land which has been compulsorily acquired and lists the five 'no-scheme rules' to be followed when applying the 'no-scheme principle'. Subsection 6A(10) provides a cross-reference to the planning assumptions in section 14 of the 1961 Act."

27. S. 32, entitled "No-scheme principle" is intended to clarify the principles and assumptions for the "no-scheme world". S. 32(3) provides that ss. 6 to 9 of the Land Compensation Act 1961 ("the 1961 Act") shall be replaced with new ss. 6A-6E, in light of which the value of acquired land is to be assessed.

28. S. 32(2) inserts a new rule into s. 5 of the 1961 Act at s. 5(2A):

> "(2A) The value of land referred to in rule (2) is to be assessed in the light of the no-scheme principle set out in section 6A."

29. However, unlike the LCR recommendations s. 6A does not:

(1) Expressly repeal all previous common law principles ("clearing the decks")[11]; or

(2) Abolish reliance on the "scheme" concept[12], though it seeks to define it more closely in ss. 6D and 6E.

30. The LC had proposed a provision which would have made the position absolutely clear[13]:

> "All previous rules, statutory or judge-made, relating to disregard of "the scheme" will cease

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[11] LCR §§7.4-7.6.

[12] LCR §§7.16-7.18; §§7.26-7.28.

[13] Part VIII, para. 8.3 the New Code, rule 13(1).

to have effect."

31. Given the circumstances it might have been thought obvious, or at least prudent, that such a provision be included. However, it was not.

32. The language of the new s. 5(2A) (above) may nonetheless have that effect by implication since it requires assessment against the new statutory principle in s. 6A and not against any other no-scheme world principle.

33. Applying the approach in ***Waters*** (see above), as well as s. 5(2A), the question is whether the new code is exhaustive? On the face of it, and unlike the provisions it replaces, s. 6A appears:

    (1) To deal with both the land being acquired and other land and draws a distinction between "the land" and "the value of land" (see e.g. s. 6A(1)), defining the principle as relating to effects on the "value of land caused by the scheme for which the authority acquires the land";

    (2) It uses the scheme cancellation assumption discussed in ***Fletcher Estates*** which, in tandem with s. 14 of the 1961 Act, limits the extent of the need to reconstruct the planning history applicable to the land acquired;

    (3) That broad definition appears to deal with the issue of land acquired by agreement also as part of the development scheme, which is not an unusual situation in CPO cases. An authority will usually seek to acquire land by agreement first (indeed is advised to do so by national guidance) before making a CPO. If this is correct, then the problem identified in ***Waters*** as arising in ***Wilson v Liverpool Corpn*** [1971] 1 WLR 302 does not arise in the case of the new provision.

34. Indeed, the recasting of the statutory disregard in s. 6A in general terms seeks to avoid the pitfalls of the old 1961 Act provisions by not setting out the equivalent of the old Schedule 1 cases (which did not cover the whole of the value to owner/no scheme principle).

35. S. 32(4) "omits" (presumably repeals) s. 15 and Schedule 1 of the 1961 Act. Those provisions are replaced by the new provisions. The removal of Schedule 1 is an obvious necessity given the replacement of its assumptions with the new rules and the removal of s. 15 removes the potential for inconsistency between the scheme cancellation assumptions and the requirement to assume that proposals of the authority enjoy planning permission. As the Law Commission noted in Law Com 286:

> "D.100 Section 15(1), inconsistently with the judicial rule, requires permission to be assumed for development of the subject land in accordance with the proposals of the planning authority, whether or not it would have been granted in the absence of the underlying scheme…"

36. The main s. 6A is as follows:

> "**6A No-scheme principle**

(1) The no-scheme principle is to be applied when assessing the value of land in order to work out how much compensation should be paid by the acquiring authority for the compulsory acquisition of the land (see rule 2A in section 5).

(2) The no-scheme principle is the principle that—

(a) any increase in the value of land caused by the scheme for which the authority acquires the land, or by the prospect of that scheme, is to be disregarded, and

(b) any decrease in the value of land caused by that scheme or the prospect of that scheme is to be disregarded.

(3) In applying the no-scheme principle the following rules in particular (the "no-scheme rules") are to be observed.

(4) Rule 1: it is to be assumed that the scheme was cancelled on the relevant valuation date.

(5) Rule 2: it is to be assumed that no action has been taken (including acquisition of any land, and any development or works) by the acquiring authority wholly or mainly for the purposes of the scheme.

(6) Rule 3: it is to be assumed that there is no prospect of the same scheme, or any other project to meet the same or substantially the same need, being carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers.

(7) Rule 4: it is to be assumed that no other projects would have been carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers if the scheme had been cancelled on the relevant valuation date.

(8) Rule 5: if there was a reduction in the value of land as a result of—

(a) the prospect of the scheme (including before the scheme or the compulsory acquisition in question was authorised), or

(b) the fact that the land was blighted land as a result of the scheme,

that reduction is to be disregarded.

(9) In this section—

"blighted land" means land of a description listed in Schedule 13 to the Town and Country Planning Act 1990;

"relevant valuation date" has the meaning given by section 5A.

(10) See also section 14 for assumptions to be made in respect of planning permission."

37. As provided by s. 6A(10), once the no-scheme world has been established, the planning assumptions in s. 14 of the 1961 Act are engaged to determine what (if any) planning permissions would be available for that land in the circumstances of the no-scheme world.

38. The new rules in s. 6A cast the net of the new "no-scheme" principle widely in that:

(1) Both increases and decreases in value caused by the scheme or the prospect of that scheme are to be disregarded (s. 6A(2));

(2) **Rules 1** (s. 6A(4)) assumes that the Scheme has been cancelled on the relevant valuation date, which limits the extent of the need to construct hypotheses with regard to the previous planning history, though if relevant planning policy can only be applied by reference to the Scheme then it should probably be disregarded (see Hickinbottom LJ in ***Boland v Bridgend CBC*** [2017] R.V.R. 243);

(3) **Rule 2** (s. 6A(5)) assumes no action has been taken wholly or mainly for the purposes

of the scheme which includes disregarded acquisition by private agreement so that actions in contemplation of the scheme which might otherwise affect land values are stripped out of the compensation assessment;

(4) **Rule 3** (s. 6A(6)) assumes there is no prospect of the same or a similar scheme to meet the same or substantially the same need as the CPP being carried out either in the exercise of a statutory function or pursuant to CPO powers[14]. Rule 3 and 4 rule out the taking into account of the what the LCR called "added value" as the result of the exercise of statutory powers;

(5) **Rule 4** (s. 6A(7) equally assumes that no other projects would have been carried out in the exercise of a statutory function or pursuant to CPO powers if the CPO had been cancelled on the relevant valuation date. The rational is similar to Rule 3 though it does not exclude consideration of the potential for private projects which do not rely on statutory powers or CPO.

(6) **Rule 5** (s. 6A(8)) disregards reductions in value as a result of statutory blight[15] as a result of the scheme or the prospect of the scheme. It does not in terms refer to the blighting effect of a development plan policy, but this appears to be subsumed within the phrase "prospect of a scheme".

39. S. 6D(6) appears to mirror s. 14(5)(d)[16] of the 1961 Act in applying new Rule 3:

> "In the application of no-scheme rule 3 in relation to the acquisition of land for or in connection with the construction of a highway (the "scheme highway") the reference in that rule to "any other project" includes a reference to any other highway that would meet the same or substantially the same need as the scheme highway would have been constructed to meet."

40. The remaining provisions of the replacements to s. 6 deal with other issues:

(1) S. 6B provides for lower compensation to be paid if other adjacent land of the person compensated gains value as a result of the scheme, and

(2) S. 6C provides for the crediting of an earlier payment of compensation for injurious affection by reducing the compensation payable if the other land affected is subsequently compulsorily acquired. This will also allow for such a reduction to be made in the case of payment of compensation to a successor in title to that other land (s. 6C(3)).

(3) s. 6D defines "the scheme" for the purposes of ss. 6A-6C S. 6D(1) states that the scheme "means the scheme of development underlying the acquisition (subject to subsections (2) to (5))", with disputes to be determined by the Lands Chamber in

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[14] See LCR §§7.23-7.25 which advised the adoption of such an approach. See its proposed Rule 13 in LCR §8.3.

[15] Unlike the LCR proposals, no reference is made to diminished prospects of planning permission. See LCR Rule 13(6) at §§8.3 and 8.16, but this may not be necessary since the assessment of planning prospects should follow s. 14.

[16] The meaning and effect of the s, 14(5)(d) disregard is a matter likely to come before the Lands Chamber later this year.

accordance with s. 6D(5)

(4) S. 6E supplements s. 6D(3) and makes further provision where land is acquired for regeneration or redevelopment which is facilitated or made possible by a "relevant transport project"[17].

David Elvin QC
Landmark Chambers
2 October 2017

[17] Defined by s. 6D(4)(a - "means a transport project carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers (regardless of whether it is carried out before, after or at the same time as the regeneration or redevelopment)". See also s. 14(5)(d) of the 1961 Act.