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The use of compulsory purchase powers for regeneration

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Introduction

1. An important tool for the delivery of regeneration projects is the ability to call on the use of compulsory purchase of land (or rights over land) to assemble the land needed to bring about the project.
2. As Lord Nicholls stated in *Waters v. Welsh Development Agency* [2004] 1 WLR 1304 at [1]:

"My Lords, compulsory purchase of property is an essential tool in a modern democratic society. It facilitates planned and orderly development. Hand in hand with the power to acquire land without the owner's consent is an obligation to pay full and fair compensation."
3. This paper considers the scope of some of the key enabling powers in the context of regeneration, and explores some recent issues that have arisen in this area. National policy on the exercise of compulsory purchase powers is found in DCLG's *Guidance on Compulsory purchase process and The Criche! Down Rules* (October 2015) ("**DCLG Guidance**").

Powers for compulsory acquisition

4. The many powers providing for the compulsory acquisition of land and rights over land include the following:
 - (1) S. 226 of the Town and Country Planning Act 1990 ("**TCPA 1990**"): the power given to a local authority to acquire land for "planning purposes", probably the most generally-used CPO power for regeneration purposes.
 - (2) S. 333ZA of the Greater London Authority Act 1999: the power for the Mayor of London to acquire compulsorily land for housing and regeneration (recently enlarged by the Neighbourhood Planning Act 2017, from a date to be appointed).
 - (3) Subs (2) and (3) of s. 9 of the Housing and Regeneration Act 2008: the power for the Homes and Communities Agency to acquire compulsorily land and new rights over land.

- (4) The general power of compulsory purchase at s. 121 of the Local Government Act 1972: the power for local authorities in conjunction with other enabling powers to acquire land for a stated purpose. E.g. A local authority can compulsorily acquire land for public libraries and museums under s. 121 of the Local Government Act 1972, using ss. 7 or 12 of the Public Libraries and Museums Act 1964. (Note that this power cannot be used for the purposes specified in s. 120(1)(b) of the LGA 1972, i.e. the benefit, improvement or development of the council's area¹. Councils may use their acquisition powers under the TCPA 1990 for these purposes).
- (5) S. 142 of the Local Government, Planning and Land Act 1980 empowers an urban development corporation to acquire land for securing the regeneration of the relevant urban development area.
- (6) S. 17 of the Housing Act 1985 empowers local housing authorities to acquire land, houses or other properties by compulsion for the provision of housing accommodation. Part IX of the HA 1985 is specifically concerned with compulsory powers in respect of slum clearance.
- (7) S. 93(2) of the Local Government and Housing Act 1989 can be used by authorities to acquire compulsorily premises consisting of, or including, housing accommodation to achieve or secure their improvement or repair; for their proper and effective management and use; or for the wellbeing of residents in the area.
- (8) S. 93(4) of the LGHA 1989 can be used by authorities to acquire compulsorily land and buildings for the purpose of improving the amenities in a "Renewal Area".
- (9) Compulsory purchase orders can also be made by local authorities under ss. 29 and 300 of the HA 1985 and s. 34 of the Housing Associations Act 1985.
- (10) A local authority can compulsorily acquire land to improve its appearance or condition. For instance, a local authority can use their compulsory purchase powers under s. 89(5) of the National Parks and Access to the Countryside Act 1949 for this purpose.
- (11) A local authority can make a compulsory purchase order for educational purposes using its powers under s. 530 of the Education Act 1996.
- (12) Airport operators can compulsorily acquire under s. 59 of the Airports Act 1986.
- (13) S. 47 of the Planning (Listed Buildings & Conservation Areas) Act 1990 gives an authority compulsory powers to acquire a listed building in need of repair.
- (14) There are powers of compulsory purchase as part of the DCO procedures for nationally significant infrastructure in the Planning Act 2008.

¹ See *R (Barnsley Metropolitan Borough Council) v Secretary of State for Communities and Local Government* [2013] P.T.S.R. 23

5. The provisions of s. 226 of the 1990 Act are explored in more detail below.
6. Note that there are also provisions which, in a manner related to compulsory purchase, allow third party rights to be overridden in order to allow development to take place where land is acquired or held for planning purposes: see ss. 203-206 of the Housing and Planning Act 2016².

Examples of cases in which the use of CPO may be used

7. The circumstances in which CPOs may be used in regeneration projects are wide. Some examples of compulsory acquisition include:
 - (1) wide scale acquisition of land and rights to enable delivery of the project e.g. the London Borough of Islington (Ashburton Grove and Lough Road, Islington) Compulsory Purchase Order 2002 which delivered the land for the Emirates Stadium for Arsenal FC and related development and the Liverpool City Council (Paradise Street Development Area, Liverpool) Compulsory Purchase Order 2003 which enabled the redevelopment of Liverpool City Centre (Liverpool One);
 - (2) the acquisition of limited land and rights to facilitate the development of land needed to deliver a wide site e.g. the provision of accesses at Southall Gasworks, the Mayor of London's first CPO in 2015);
 - (3) the acquisition of land to remedy harmful aspects of the regeneration e.g. Land Authority for Wales (Gwent Levels Wetlands Reserve, Newport) Compulsory Purchase Order 1997 to acquire compensatory habitat for the loss of 500-acres of wild bird habitats in the Taff Ely estuary as a result of the Cardiff Bay Barrage³ or the supplementary CPO in Liverpool to replace the fire station displaced by the Paradise Street CPO;
 - (4) the acquisition of land and rights to deliver major infrastructure projects, e.g. ss. 6 and 7 of the Crossrail Act 2008 or ss. 4-11 of the High Speed Rail (London – West Midlands) Act 2017.

² Replacing s. 237 of the TCPA 1990. S. 206 quaintly provides that "Schedule 19 gets rid of legislation replaced by sections 203 and 204".

³ *Waters* in CA [2003] Env. L.R. 15 Carnwath LJ paras. 4-16 for the factual background.

Section 226 TCPA 1990

8. S. 226 of the TCPA 1990 provides:

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

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

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

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

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

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

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

...

(3) Where a local authority exercise their power under subsection (1) in relation to any land, they shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily—

(a) any land adjoining that land which is required for the purpose of executing works for facilitating its development or use; or

(b) where that land forms part of a common or open space or fuel or field garden allotment, any land which is required for the purpose of being given in exchange for the land which is being acquired.

(4) It is immaterial by whom the local authority propose that any activity or purpose mentioned in subsection (1) or (3)(a) should be undertaken or achieved (and in particular the local authority need not propose to undertake an activity or to achieve that purpose themselves).”

9. The purpose of the s. 226 power is explained at para. 65 of the DCLG Guidance:

“This power is intended to provide a positive tool to help acquiring authorities with planning powers to assemble land where this is necessary to implement proposals in their Local Plan or where strong planning justifications for the use of the power exist. It is expressed in wide terms and can therefore be used to assemble land for regeneration and other schemes where the range of activities or purposes proposed mean that no other single specific compulsory purchase power would be appropriate”.

10. Para. 66 restricts the use of the general power:

“This power should not be used in place of other more appropriate enabling powers. The statement of reasons accompanying the order should make clear the justification for the use of this specific power. In particular, the Secretary of State may refuse to confirm an order if he considers that this general power is or is to be used in a way intended to frustrate or overturn the intention of Parliament by attempting to acquire land for a purpose which had been explicitly excluded from a specific power.”

11. S. 226(1)(a) enables acquiring authorities with planning powers to acquire land if they

“think” that it will facilitate the carrying out of development⁴, redevelopment or improvement on, or in relation to, the land being acquired and it is not certain that they will be able to acquire it by agreement. The wide power in s. 226(1)(a) is subject to s. 226(1A) which restricts the exercise of the power unless the authority thinks that the proposed development, redevelopment or improvement is likely to contribute to achieving the promotion or improvement of the **economic, social or environmental well-being** of its administrative area⁵.

12. Para. 76 sets out the key requirements to obtain the Secretary of State’s confirmation of a CPO under s. 226⁶:

“What factors will the Secretary of State take into account in deciding whether to confirm an order under section 226(1)(a)?

Any decision about whether to confirm an order made under section 226(1)(a) will be made on its own merits, but the factors which the Secretary of State can be expected to consider include:

- whether the purpose for which the land is being acquired fits in with the adopted Local Plan for the area or, where no such up to date Local Plan exists, with the draft Local Plan and the National Planning Policy Framework
- the extent to which the proposed purpose will contribute to the achievement of the promotion or improvement of the economic, social or environmental wellbeing of the area
- whether the purpose for which the acquiring authority is proposing to acquire the land could be achieved by any other means. This may include considering the appropriateness of any alternative proposals put forward by the owners of the land, or any other persons, for its reuse. It may also involve examining the suitability of any alternative locations for the purpose for which the land is being acquired.”

13. The existence of a planning permission will not in itself be sufficient to establish that the public interest will be best served by the confirmation of the order. For example, demonstrating that there are no likely impediments to the delivery of the scheme may frequently involve identifying a preferred developer to carry out the development, which in turn may necessitate consideration of issues such as procurement, best value, adequacy of funding and resources to deliver the project as well as the negotiation of a CPO indemnity agreement and a development agreement.

14. S. 226(1)(b) of the TCPA 1990 gives an authority the power to acquire land in their area which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated. As recognised by the GPDO Guidance at para. 67, the potential scope of this power is broad, and it is intended to be used primarily

⁴ As defined in section 55 of Town and Country Planning Act 1990.

⁵ See DCLG Guidance at para. 73.

⁶ There is similar specific guidance for the other main statutory powers of CPO.

to acquire land which is not required for development, redevelopment or improvement, or as part of such a scheme.

Legal requirements

15. Until *R (Sainsbury's Supermarkets Ltd) v. Wolverhampton CC* [2011] 1 A.C. 437 and *R (Argos Ltd) v. Birmingham CC* [2012] J.P.L. 401 there was little direct authority on the current, wider scope of s. 226⁷ following the amendments in the 2004 Act. An authority only now needs show that it “thinks” that “the acquisition will facilitate” the proposed redevelopment etc. and that such redevelopment etc is likely to contribute to the achievement of the promotion of well-being of their area in one or more of the three senses specified.

16. Ouseley J. held in *Argos* that the reference to “development, redevelopment and improvement” is plainly to the development described in the CPO, and is not tied to any particular permission or scheme:

“141. In my judgment, the language of section 226(1A) does not have the significance Mr Lockhart-Mummery seeks to put on it in support of his argument that the court should consider contextual or extraneous material in interpreting the CPO. Granted that “the development, redevelopment or improvement” refers back to section 226(1)(a) , it can mean no more than the development, redevelopment or improvement, the carrying out of which the authority thinks acquisition must facilitate, and that is not tied to any particular planning permission or development scheme. It is instead the development, the carrying out of which the compulsory purchase acquisition power has been used to facilitate. That development is the development described in the CPO. The definite article, “the” in section 226(1A) is no more than the means of referring to whatever development the acquiring authority has thought a CPO would facilitate. That is to be found in the CPO itself.”

17. Accordingly, changes to a scheme after the CPO is confirmed but before vesting pursuant to the CPO can be made provided they fall within the purpose of the CPO as set out in the CPO itself.

18. In exercising the s. 226 power, the authority must be satisfied that the development, redevelopment or improvement is likely to contribute to the achievement of the promotion of the economic, social or environmental well-being of the area. This links the power of compulsory purchase to the local authority’s general “well-being” powers under s. 2 of the Local Government Act 2000, which allow local authorities to undertake a wide range of activities for the benefit of their local area and to improve the quality of life of local residents, businesses and those who commute to or visit the area.

19. The s. 226(1A) criteria are intended to be more flexible than those formerly in s.226(2). In *Argos* at para. 139 Ouseley J. stated:

⁷ On the former version of the power see *R v. Secretary of State ex p. Leicester CC* (1987) 55 P. & C.R. 364, *Sharkey v. Secretary of State* [1992] 2 P.L.R. 11, at 18-19 and

“It is also clear to my mind that while section 226(1A) is an additional limitation on section 226(1)(a) powers, it is intended to be a less narrow requirement than formerly in section 226(2) , since the requirement is now a broad requirement to be satisfied in relation to the well-being objectives, rather than to have regard to the development plan, any planning permission and material planning considerations in deciding whether potential order land is suitable for development, redevelopment or improvement.”

20. Satisfaction of s. 226(1A) TCPA is a necessary (though not sufficient) pre-condition to the making of a CPO: see **Argos** at paras. 135-141. Failure to consider it could threaten the confirmation of a CPO. For example, the Inspector considering Lancashire County Council’s East Lancashire Waste Technology Park) Compulsory Purchase Order 2008 recommended that the order was not confirmed on the basis that *“consideration of the question whether the development is likely to contribute to the achievement of the provision or improvement of the economic, social or environmental wellbeing of the area needs to take place when the authorising of the CPO is being addressed.”* It had not been, the “well-being” contribution of the CPO having instead been justified at a later point. The Secretary of State did not confirm the order, although he did not make a finding on this issue.
21. In **Sainsbury’s**, the Supreme Court considered whether the well-being objects in s.226(1A) need to flow from the proposed redevelopment, or whether a local authority is entitled to take into account, in discharging its duty under that subsection, a commitment to secure the development, redevelopment or improvement of another unconnected site.
22. Sainsbury’s owned 86% of a site at Raglan Street, just outside the Wolverhampton Ring Road, with Tesco’s controlling the remainder. Both wanted to develop the site and had planning permission to do so. Each required the local authority to use its compulsory purchase powers to allow development on the entire site. Tesco’s also controlled a different site, called the Royal Hospital Site, which the local authority wished to regenerate. It was not financially viable for Tesco to develop this site without a subsidy from elsewhere. Tesco therefore entered into a section 106 obligation making implementation of its development at Raglan Street contingent upon it regenerating the Royal Hospital Site (effectively cross-subsidising the latter with the proceeds from the former). The local authority made a compulsory purchase order to acquire the part of the Raglan Street site owned by Sainsbury’s, and took into account Tesco’s undertaking to regenerate the Royal Hospital Site.
23. Giving the lead judgment, Lord Collins held that it is legitimate for a local authority to take into account “off-site” benefits of a proposed development, provided that such benefits are related to or connected with the development itself. A local authority could not, however, rely on s. 226(1A) to take into account a commitment by the developer of a site part of which was to be the subject of a CPO to secure, by cross-subsidy, the development, redevelopment or improvement of another unconnected site and so achieve further well-being benefits for the area. There was insufficient connection in that case between the proposed development on the Raglan Street site and the benefits from the development of the Royal Hospital Site.

This was because it was entirely a matter for Tesco how it would fund any loss from, or present any lower return from, the Royal Hospital Site.

General considerations

Justifying compulsory purchase

24. There is a general requirement to demonstrate a **compelling case in the public interest** which must be met in all CPO cases, which has been expressed differently over time and which has formed part of national policy for many years. It also reflects the requirements of the ECHR in terms of the need to justify in a proportionate manner the exercise of such public powers to override private rights under Article 8 (“**A8**”) and Article 1 of the First Protocol (“**A1P1**”)⁸.

25. This also reflects the constitutional significance of compulsory purchase. See Laws J. in *Chesterfield Properties Plc v. Secretary of State* (1997) 76 P. & C.R. 117 at 130:

“To some ears it may sound a little eccentric to describe, for example, Kwik Save's ownership of their shop in Stockton as a human right; but it is enough that ownership of land is recognised as a constitutional right, as Lord Denning said it was. The identification of any right as “constitutional”, however, means nothing in the absence of a written constitution unless it is defined by reference to some particular protection which the law affords it. The common law affords such protection by adopting, within *Wednesbury*, a variable standard of review. There is no question of the court exceeding the principle of reasonableness. It means only that reasonableness itself requires in such cases that in ordering the priorities which will drive his decision, the decision-maker must give a high place to the right in question. He cannot treat it merely as something to be taken into account, akin to any other relevant consideration; he must recognise it as a value to be kept, unless in his judgment there is a greater value that justifies its loss. In many arenas of public discretion, the force to be given to all and any factors which the decision-maker must confront is neutral in the eye of the law; he may make of each what he will, and the law will not interfere because the weight he attributes to any of them is for him and not the court. But where a constitutional right is involved, the law presumes it to carry substantial force. Only another interest, a public interest, of greater force may override it. The decision-maker is, of course, the first judge of the question whether in the particular case there exists such an interest which should prevail.”

26. The DCLG Guidance at para. 12 gives general guidance on the justification required for compulsory purchase orders across the whole range of enabling powers:

“A compulsory purchase order should only be made where there is a compelling case in the public interest.

An acquiring authority should be sure that the purposes for which the compulsory purchase order is made justify interfering with the human rights of those with an interest in the land affected. Particular consideration should be given to the provisions of Article 1 of the First Protocol to the European Convention on Human Rights and, in the case of a dwelling, Article 8

⁸ See *Sporrong & Lönnroth v. Sweden* (1983) 5 EHRR 35 and *James v. UK* (1986) 8 EHRR 123.

of the Convention.”

27. This test encapsulates the common law constitutional significance of the expropriation of private property interests as well as the requirements of proportionality and fair balance found, respectively, in Article 8 and Article 1 of the First Protocol to the European Convention on Human Rights (“**the Convention**”). See:

- (1) The pre-HRA approach is set out in *Prest v Secretary of State for Wales* [1982] 81 L.G.R. 193, *R v. Secretary of State for Transport ex parte de Rothschild* [1989] 1 All E.R. 933 and *Chesterfield Properties PLC v. Secretary of State* (1997) 76 P. & C.R. 117⁹; and
- (2) The close relationship of the “compelling case” test to ECHR cases post-HRA is considered in *Tesco Stores Ltd v. Secretary of State* (2000) P & CR 427 at 429, *Bexley LBC v. Secretary of State* [2001] EWHC Admin 323 at [46], *R (Clays Lane Housing Co-operative Ltd) v. Housing Corporation* [2005] 1 WLR 2229, *Pascoe v First Secretary of State* [2007] 1 W.L.R. 885 and *R. (Hall) v. First Secretary of State* [2008] J.P.L. 63 at [15].

28. Para. 13 of the DCLG Guidance states:

“The minister confirming the order has to be able to take a balanced view between the intentions of the acquiring authority and the concerns of those with an interest in the land that it is proposing to acquire compulsorily and the wider public interest. The more comprehensive the justification which the acquiring authority can present, the stronger its case is likely to be.

However, the confirming minister will consider each case on its own merits and this guidance is not intended to imply that the confirming minister will require any particular degree of justification for any specific order. It is not essential to show that land is required immediately to secure the purpose for which it is to be acquired, but a confirming minister will need to understand, and the acquiring authority must be able to demonstrate, that there are sufficiently compelling reasons for the powers to be sought at this time.

If an acquiring authority does not:

- have a clear idea of how it intends to use the land which it is proposing to acquire; and
- cannot show that all the necessary resources are likely to be available to achieve that end within a reasonable time-scale

it will be difficult to show conclusively that the compulsory acquisition of the land included in the order is justified in the public interest, at any rate at the time of its making.”

29. Although the importance of the rights being balanced is emphasised in the consideration above, the critical point in the decision is the weighing of the public interest with the private rights and the decision whether the former is sufficiently significant to outweigh the latter. This remains a classic discretionary judgment for the Secretary of State and, provided no

⁹ Ouseley J in *Grafton Group (UK) plc v Secretary of State for Transport* [2015] EWHC 1083 (Admin) (affirmed on appeal: [2017] 1 W.L.R. 373) said that *Prest* and *de Rothschild* are “commonly cited together for their differing tones and emphasis, the vigour of the language of the earlier tempered by the later” [10].

errors of law have been made in approaching the factors to be taken into account in undertaking the exercise, it will be difficult to overturn in court.

Public sector equality duty – s. 149 of the Equality Act 2010

30. The DCLG Guidance at para. 6 states:

“All public sector acquiring authorities are bound by the Public Sector Equality Duty as set out in section 149 of the Equality Act 2010. In exercising their compulsory purchase and related powers (eg powers of entry) these acquiring authorities must have regard to the effect of any differential impacts on groups with protected characteristics.

For example, an important use of compulsory purchase powers is to help regenerate run down areas. Although low income is not a protected characteristic it is not uncommon for people from ethnic minorities, the elderly or people with a disability to be over-represented in low income groups. As part of the Public Sector Equality Duty, acquiring authorities must have due regard to the need to promote equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. This might mean that the acquiring authority devises a process which promotes equality of opportunity by addressing particular problems that people with certain protected characteristics might have (eg making sure that documents are accessible for people with sight problems or learning difficulties and that people have access to advocates or advice).”

Funding and viability

31. As the *Sainsbury’s* case indicates, questions as to the viability of a regeneration project often emerge when considering whether to make or confirm a CPO. There is nothing in s. 226(1) which imposes a legal requirement for it to be demonstrated that the development will proceed before the Secretary of State may authorise the order: see *Chesterfield Properties v Secretary of State for the Environment* (1997) 76 P. & C.R. 117. Funding is, however, made a relevant consideration (for all forms of compulsory acquisition) by the DCLG Guidance, at least to the extent that is necessary to satisfy the Secretary of State that the scheme is likely to proceed within a reasonable time. Para. 13 states that “if an acquiring authority ... cannot show that all the necessary resources are likely to be available to achieve that end within a reasonable time-scale, it will be difficult to show conclusively that the compulsory acquisition of the land included in the order is justified in the public interest, at any rate at the time of its making”. Para. 14 adds:

“14. What information about the resource implications of the proposed scheme does an acquiring authority need to provide?”

In preparing its justification, the acquiring authority should address:

a) **sources of funding** - the acquiring authority should provide substantive information as to the sources of funding available for both acquiring the land and implementing the scheme for which the land is required. If the scheme is not intended to be independently financially viable, or that the details cannot be finalised until there is certainty that the necessary land will be required, the acquiring authority should provide an indication of how any potential shortfalls are intended to be met. This should include:

- the degree to which other bodies (including the private sector) have agreed to make financial contributions or underwrite the scheme; and
- the basis on which the contributions or underwriting is to be made

b) **timing of that funding** - funding should generally be available now or early in the process. Failing that, the confirming minister would expect funding to be available to complete the compulsory acquisition within the statutory period “(see section 4 of the Compulsory Purchase Act 1965) following the operative date, and only in exceptional circumstances, would it be reasonable to acquire land with little prospect of the scheme being implemented for a number of years

Evidence should also be provided to show that sufficient funding could be made available immediately to cope with any acquisition resulting from a blight notice.”

32. The form of demonstration of viability may vary from case to case and in many cases involving a commercial developer, there will be difficulties of commercial confidentiality in disclosing detailed information e.g. development appraisals etc. In many cases, the case may have to be made by reference to less specific evidence, e.g. development track-record, expenditure to date etc. In cases involving the use of public money, however, and the availability of public funding more specific information may be required in practice. There is no specific requirement to produce development appraisals or formal viability evidence.
33. There may be a compelling case in the public interest for confirming a CPO notwithstanding doubts about the financial viability of the scheme. The weight to be given to the issue of financial viability, in balancing it against other considerations, is a matter for the Secretary of State and unlikely to be challengeable in Court: see *Green v. Secretaries of State for the Environment and Transport* [1985] J.P.L. 119.

Alternatives

34. The mere existence of an alternative proposal does not of itself prevent there being a compelling case in the public interest whether as a matter of UK law or under the ECHR. In *James v. UK* (1986) 8 E.H.R.R. 123 at [51] the ECtHR considered the application of A1P1 and expropriation of property (in the context of leasehold reform legislation which entitled tenants to enfranchise certain long leases despite their landlords’ opposition):

“51. According to the applicants, the security of tenure that tenants already had under the law in force (see paragraphs 11 in fine and 16 above) provided an adequate response and the draconian nature of the means devised to give effect to the alleged moral entitlement, namely deprivation of property, went too far. This was said to be confirmed by the absence of any true equivalent to the 1967 Act in the municipal legislation of the other Contracting States and, indeed, generally in democratic societies. It is, so the applicants argued, only if there was no other less drastic remedy for the perceived injustice that the extreme remedy of expropriation could satisfy the requirements of Article 1 (P1-1).

This amounts to reading a test of strict necessity into the Article, an interpretation which the Court does not find warranted. The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a "fair balance". Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way (see, mutatis mutandis, the *Klass and Others* judgment of 6 September 1978 ...).”

35. With regard to the issue of alternatives, and the application of the requirements of proportionality under A8 and fair balance under A1P1, the Courts have not adopted the more stringent approach of requiring the least intrusive means to be adopted, although the DCLG Guidance does require there to be consideration under para. 76

“whether the purpose for which the acquiring authority is proposing to acquire the land could be achieved by any other means. This may include considering the appropriateness of any alternative proposals put forward by the owners of the land, or any other persons, for its reuse. It may also involve examining the suitability of any alternative locations for the purpose for which the land is being acquired.”

36. Maurice Kay LJ held in *R. (Clays Lane Housing Cooperative Ltd) v. Housing Corp* [2005] 1 WLR 2229 at [25]:

“I conclude that the appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest *and* as being reasonably necessary but not obligatorily the least intrusive of Convention rights. That accords with Strasbourg and domestic authority. It is also consistent with sensible and practical decision making in the public interest in this context. If ‘strict necessity’ were to compel the ‘least intrusive’ alternative, decisions which were distinctly second best or worse when tested against the performance of a regulator's statutory functions would become mandatory. A decision which was fraught with adverse consequences would have to prevail because it was, perhaps quite marginally, the least intrusive. Whilst one can readily see why that should be so in some Convention contexts, it would be a recipe for poor public administration in the context of cases such as *Lough v First Secretary of State*¹⁰ and the present case.”

37. This was followed in *Pascoe v First Secretary of State* [2007] 1 W.L.R. 885.
38. Similarly, see *R. (Hall) v. First Secretary of State* [2008] J.P.L. 63 at [15], where a CPO had been made of a scrapyard adjacent to a proposed public park in the green belt in the interests of the proper planning of the area and to achieve policy objectives concerning damaged, derelict and degraded land. Carnwath LJ also considered the extent to which there might be a duty to explore alternatives even if they had not been advanced by objectors:

“21. To what extent was the Secretary of State under a duty to explore such alternatives, even if not presented by the parties? His primary task under the statute is to consider the issues raised by objections to the CPO, not to search for alternatives. On the other hand, to satisfy himself that there is a “compelling case” for compulsory acquisition, particularly where objectors are unrepresented, fairness may require him to consider at least any obvious alternatives. In this case, the Secretary of State did consider the possibility of a discontinuance order, even though it had not been suggested by the objectors. He dismissed it because it would not resolve future management issues, as would be achieved by the agreement with BA. I do not think he can be criticised for not considering section 215. It was not mentioned at the inquiry. On its face it is not directed to the real problem. It enables the authority to serve a notice where the amenity of the area is adversely affected by “the condition of land in their area”. But the problem here was not the “condition” of the land, but the inevitable impact of its lawful use. That could only be remedied by statutory action providing for cessation and proper compensation. In my view his judgment on the material before him cannot be

¹⁰ [2004] 1 W.L.R. 2557

categorised as unfair or irrational.”

39. It is necessary for an alternative to be considered and evaluated when judging whether there is a compelling case in the public interest for the CPO. Alternative proposals may not provide the basis for defeating a CPO if they:
- (1) are uncertain in their delivery of the objectives which underpin the public interest basis for confirming the CPO, e.g. because they do not secure certain delivery of the objectives of the Scheme in the public interest, or lack the relevant permissions or consents, or generally lack certainty in the delivery of relevant proposals in the public interest;
 - (2) will delay the implementation of the CPO scheme where a timely delivery of the proposals is in the public interest; or
 - (3) will not deliver the public interest benefits of the CPO scheme as well or as effectively as that scheme, or in the timely manner of the scheme, where that difference in delivery of benefits and timing are material ones having regard to the public interest.
40. Indeed, ***Bexley LBC v. Secretary of State*** [2001] EWHC Admin 323 at paras. [44], [47] & [48] makes it clear that the Secretary of State and the Courts consider that the creation of delay and uncertainty in considering alternative proposals put forward in support of CPO objections is a highly material consideration in rejecting the objections and confirming the CPO. If there are compelling public reasons for the delivery of the Scheme, the delivery of alternatives may cause delay and uncertainty in the delivery of the scheme and its public benefits which may not be considered to be acceptable.

Planning considerations

41. Although s. 226 no longer contains a statutory requirement¹¹ to have regard to the development plan, planning permission and other material considerations, nonetheless planning policy remain a material consideration in the determination of whether there is “*compelling case in the public interest*” for the CPO as required by the DCLG Guidance. At para. 74, it provides:

“The planning framework providing the justification for an order should be as detailed as possible in order to demonstrate that there are no planning or other impediments to the implementation of the scheme. Where the justification for a scheme is linked to proposals identified in a development plan document which has been through the consultation processes but has either not yet been examined or is awaiting the recommendations of the Inspector, this will be given due weight.

Where the Local Plan is out of date, it may well be appropriate to take account of more detailed proposals being prepared on a non-statutory basis with the intention that they will be incorporated into the Local Plan at the appropriate time. Where such proposals are being used

¹¹ It was contained in s. 226(2) which was repealed in 2004.

to provide additional justification and support for a particular order, there should be clear evidence that all those who might have objections to the underlying proposals in the supporting non-statutory plan have had an opportunity to have them taken into account by the body promoting that plan, whether or not that is the authority making the order. In addition, the National Planning Policy Framework is a material consideration in all planning decisions and should be taken into account.”

42. Furthermore, at para. 15:

“The acquiring authority will also need to be able to show that the scheme is unlikely to be blocked by any physical or legal impediments to implementation. These include:

- the programming of any infrastructure accommodation works or remedial work which may be required; and
- any need for planning permission or other consent or licence

Where planning permission will be required for the scheme, and permission has yet to be granted, the acquiring authority should demonstrate to the confirming minister that there are no obvious reasons why it might be withheld.”

43. That said, para. 75 strikes a more pragmatic tone:

“It may not always be feasible or sensible to wait until the full details of the scheme have been worked up, and planning permission obtained, before proceeding with the order. Furthermore, in cases where the proposed acquisitions form part of a longer-term strategy which needs to be able to cope with changing circumstances, it may not always be possible to demonstrate with absolute clarity or certainty the precise nature of the end use proposed. In all such cases the responsibility will lie with the acquiring authority to put forward a compelling case for acquisition in advance of resolving all the uncertainties.”

44. Note also that the Secretary of State in confirming an Order made under s. 226 is entitled to disregard any objection which is in substance an objection to the provisions of the development plan defining the proposed use of that or any land (s. 245(1)).

45. Even in the context of the former statutory duty, in *Alliance Spring Co Ltd & Others v. First Secretary of State* [2005] 3 P.L.R. 76 Collins J. held at para. 16 that was not generally appropriate for an inspector to reconsider the planning issues already considered in the grant of permission:

“[The Secretary of State] recognised that the Inspector could properly have regard to the planning aspects: indeed, s. 226(2)(c) of the 1990 Act makes it clear that he should. But he noted that those matters were taken into account in the grant of planning permission. In those circumstances, it is not in my view appropriate for an Inspector to take a different view on planning considerations which have already been considered unless there is fresh material or a change of circumstances. Clearly if there is evidence to show that particular matters were not taken into account or were not fully considered, a fresh view can properly be taken.”

46. It is obviously important for an authority and the developer to seek to avoid legal challenges to planning permissions for the development which the CPO is intended to facilitate. This is illustrated by the situation in *BT v. Gloucester City Council* [2002] 2 P. & C.R. 33 in which a planning permission was quashed by the High Court for a defective EIA screening exercise,

which in turn had serious repercussions for a CPO inquiry in relation to two CPOs underpinning the scheme to which the quashed planning permission related.¹² On the other hand, the challenge to the permission underlying the [] was dismissed in

47. The relationship between planning permission and CPO confirmation was recently considered in ***Grafton Group (UK) Plc v Secretary of State for Transport*** [2017] 1 W.L.R. 373. The inspector simultaneously recommended refusal of the Grafton Group's application for planning permission to return vacant land at Orchard Wharf to active wharf use, whilst also recommending confirmation of a CPO under the Port of London Act 1968 to acquire that land. The Secretary of State confirmed the CPO and it was challenged by the Grafton Group, who owned the land.
48. Ouseley J upheld the challenge: [2015] EWHC 1083 (Admin)¹³. He held that it had not been wrong in principle to confirm a CPO despite the rejection of a planning application to develop it. However, there had been insufficient evidence that there was a reasonable prospect of it being used for the purpose for which it had been acquired.
49. The claimants wanted to redevelop the wharf for residential use. The relevant local plan policy provided that this would only be acceptable if use of the wharf for waterborne freight handling was no longer viable. Planning permission was sought for a cement batching plant receiving aggregates by boat. The inspector considered that the local plan policy justified the proposed use, but recommended refusal due to poor design. On the basis of a reasonable prospect of a better design coming forward in future, the inspector recommended CPO confirmation. The Secretary of State agreed.
50. The Grafton Group brought a challenge on 11 grounds. The key complaints for present purposes were that (1) the asserted need for more wharf capacity had not been made out so the CPO should not have been confirmed; (2) the CPO should not have been confirmed on the basis of a different scheme; (3) there was a difference between the way that the wharf developers presented their case at the inquiry and the basis on which the CPO was confirmed; (4) there was no evidential basis for finding that there was a real prospect of an acceptable planning permission being granted; (5) they did not have a fair opportunity to deal with the change in basis for confirmation.
51. At [99], Ouseley J noted that there was a distinction between the *purpose* of making a CPO and the *justification* for acquiring the land to meet that purpose. The justification for a CPO could change, without error of law, provided that the case on justification could fairly be

¹² See P. Winter & R. Lloyd, *Regeneration, Compulsory Purchase Orders & Practical Related Issues* [2006] JPL 781 at 795.

¹³ He gave a separate judgment concerning relief ([2015] EWHC 1889 (Admin)).

met in the inquiry process (citing *Procter & Gamble Ltd v Secretary of State for the Environment* (1992) 4 Admin. L.R. 564).

52. Ouseley J said at para. 117:

“My judgment, in summary, is that there was nothing wrong in principle in confirming the CPO despite the dismissal of the planning appeal. The Secretary of State was also entitled to conclude that there was a reasonable prospect of some form of aggregates/cement handling permission being granted. But that meant that the basis upon which the CPO was confirmed was different from the basis upon which it had been promoted throughout the Inquiry. If the Secretary of State concluded that there was a reasonable prospect of an acceptable scheme which was not significantly different in throughput from the appeal scheme, or of the implementation of a scheme which was significantly different in throughput, those conclusions had no evidential basis. The Secretary of State did not give Grafton a fair opportunity to deal with his basis for confirming the CPO, changed as it was from that presented at the Inquiry. Had he followed the suggestion of the Inspector about a “minded to confirm” letter, these problems could have been avoided.”

53. Ouseley J went on to deal with the relationship between a planning permission and a CPO:

“118. It is obvious that the Inspector and Secretary of State would have erred if it had been a requirement of law or policy that the CPO be not confirmed unless the appeal scheme with which it was promoted were permitted. That scheme was refused, and it was unlikely in the Inspector's view that the re-examination of design and layout would succeed in justifying that which had been found so objectionable.

119. There is, however, no statutory provision or policy requiring that a planning permission, or other necessary project consent, be in force for the development or use of the land for the purpose for which the CPO is to be confirmed. Confirmation of a CPO is not in law or policy necessarily tied to any particular scheme for which planning permission is simultaneously sought. So the refusal of planning permission for a particular scheme on grounds which the Inspector thought remediable, rather than fatal in principle to the very purpose of the CPO, does not necessarily require non-confirmation of the CPO, and the starting of the whole process all over again with a different planning application. So there was no error in principle of itself in confirming the CPO while dismissing the planning appeal.

120. The fact that the PLA put forward a particular scheme as the basis for saying that there was a reasonable prospect of the purpose of the CPO being fulfilled, and for measuring the public interest in compulsory acquisition to go into the balance against the private interest in the landowner retaining his property, would therefore not bar the PLA from saying at the same time that another, lesser scheme could also come forward, and adequately justify compulsory acquisition if its favoured scheme were refused planning permission.

121. The CPO here could have been confirmed, even if no planning permission had been sought at all, provided (1) that the Secretary of State concluded that there was a reasonable prospect of the wharf receiving planning permission for aggregates and cement handling, with or without concrete batching, (2) that the evidence showed a reasonable prospect that such a permission would be implemented, (3) that what was reasonably in prospect was sufficient to show that the balance of public advantage over private disadvantage compellingly justified compulsory acquisition, and (4) that, if there had been a change in the basis upon which the CPO was to be confirmed, the procedure adopted gave a fair opportunity to the landowner to meet it.”

54. The CPO in this case had been confirmed, not on a basis put forward by the wharf developers, but on the broader basis that a planning permission would be forthcoming to reactivate the wharf to the public benefit: see [137].

55. However, Ouseley J found that there was a shortage of evidence for the Inspector’s and Secretary of State’s conclusions that the unspecific scheme would be implemented. At [150] he made a general observation about the importance of the “compelling case in the public interest” test:

“The justification for the CPO should be compelling in the public interest. The land cannot be acquired unless there is a reasonable prospect that it would be used for the purpose for which it is acquired. That “reasonable prospect” test cannot be allowed to become an undemanding threshold. A reasonable prospect that the land will be put to the use for which it was acquired, so as to achieve the benefits which warranted the acquisition requires sound evidence, sufficient to warrant taking someone’s property from them.”

56. Ouseley J also did not consider that Grafton had received a fair opportunity to deal with the change in the basis of confirmation. He noted that the possibility of confirming the CPO whilst refusing planning permission was not considered at the inquiry and he held [156]:

“... what happened was unfair. Grafton did not have a fair crack of the whip. The basis of confirmation was not the basis upon which the Inquiry had been conducted, as I have already concluded. If there was a case sufficient to justify confirmation of the CPO on a different basis, Grafton ought to have been given a chance to deal with it, but was not.”

57. The Court of Appeal affirmed both judgments, albeit for different reasons in the case of the former. Importantly for present purposes, the appeal did not upset Ouseley J’s conclusion that, in principle, CPO confirmation could proceed despite the dismissal of the planning appeal, nor his conclusion that CPO confirmation is not tied to a particular scheme: see [29]. The Court of Appeal instead disagreed with Ouseley J’s view that the Secretary of State had not had legally sufficient evidence on which to conclude that the order should be confirmed on the different basis.

Negotiations

58. It is often said that CPO should only be used as a last resort and complaint is often made by objectors that there have been insufficient attempts to negotiate. However, whilst the DCLG Guidance emphasises the importance of negotiation with those whose interests are to be affected, para. 2 states that a pragmatic approach may be justified:

“... if an acquiring authority waits for negotiations to break down before starting the compulsory purchase process, valuable time will be lost. Therefore, depending on when the land is required, it may often be sensible, given the amount of time required to complete the compulsory purchase process, for the acquiring authority to:

- plan a compulsory purchase timetable as a contingency measure; and
- initiate formal procedures

This will also help to make the seriousness of the authority’s intentions clear from the outset, which in turn might encourage those whose land is affected to enter more readily into meaningful negotiations.”

Best value, state aid and procurement

59. There are other legal requirements relating to local authorities obtaining best value and the parallel EU requirements preventing state aid which will have to be observed in any arrangements with private developers for undertaking regeneration work where local authority property is to be disposed of or made available to such developers. See s. 123 of the Local Government Act 1972 and s. 233 of the TCPA 1990 and *R. (Midlands Co-operative Society Ltd) v. Birmingham City Council* [2012] B.L.G.R. 393 and *R. (Faraday Development Ltd) v. West Berkshire Council* [2016] EWHC 2166 (Admin).
60. The procurement rules in the Public Contract Regulations 2015 may apply to development agreements and planning obligations, depending on their terms, and also inhibit any significant amendments to such agreements. See *Helmut Müller GmbH v. Bundesanstalt für Immobilienaufgaben* (C-451/08) [2011] P.T.S.R. 200, *Midlands Co-operative Society Ltd* (above), *Faraday Development Ltd* (above) and *R (Gottlieb) v. Winchester City Council* [2015] EWHC 231 (Admin).

Footnote: Housing White Paper

61. On 7 February 2017, DCLG published a white paper “Fixing our broken housing market” which includes proposals to:
- (1) “amend national policy to encourage local planning authorities to consider the social and economic benefits of estate regeneration, and use their planning powers to help deliver this to a high standard”: para. 1.28;
 - (2) “amend and add to national policy to make clear that ... authorities should amend Green Belt boundaries only when they can demonstrate that they have examined fully all other reasonable options for meeting their identified development requirements, including ... making effective use of ... the opportunities offered by estate regeneration”: para. 1.39.
62. The White Paper also states (emphasis in the original):

“2.43. Compulsory purchase law gives local authorities extensive powers to assemble land for development. Through the Housing and Planning Act 2016 and the Neighbourhood Planning Bill currently in Parliament we are reforming compulsory purchase to make the process clearer, fairer, and faster, while retaining proper protections for landowners. Local planning authorities should now think about how they can use these powers to promote development, which is particularly important in areas of high housing need.

2.44. We propose to encourage more active use of compulsory purchase powers to promote development on stalled sites for housing. **The Government will prepare new guidance to local planning authorities following separate consultation, encouraging the use of their compulsory purchase powers to support the build out of stalled sites.** We will investigate whether auctions, following possession of the land, are sufficient to establish an unambiguous value for the purposes of compensation payable to the claimant, where the local authority has used their compulsory purchase powers to acquire the land.

2.45 In addition, the Homes and Communities Agency (HCA), will take a more proactive role on compulsory purchase, by working closely with local authorities, and other parties where appropriate, to use their compulsory purchase powers to support the development and regeneration of land for housing, where this is consistent with the HCA's objectives and powers.

2.46. **We will keep compulsory purchase under review and welcome any representations for how it can be reformed further to support development."**

63. However, following the General Election 2017, the Queen's Speech contained no proposals to reform CPO powers for housing or any other purposes. All that is proposed in terms of housing is said to be non-legislative in nature, presumably more policy or guidance:

"Proposals will be brought forward to ban unfair tenant fees, promote fairness and transparency in the housing market, and help ensure more homes are built."

64. The background briefing notes¹⁴ include at pp. 72-3:

"HOUSING

"Proposals will be brought forward to [...] help ensure more homes are built."

- We have not built enough homes in this country for generations. In order to fix the dysfunctional housing market, we need to build more of the right homes, in the right places, and ensure the housing market works for all parts of our community.
- This will help to tackle the increasing lack of affordability by bringing more properties onto the market. It will slow the rise in housing costs relative to the rise in wages, and help ordinary working people gain better access to this most basic of necessities. It will help more ordinary working families buy an affordable home and will bring the cost of renting down.
- In February we published a Housing White Paper, which proposes end-to-end action across the whole housing system, with measures to:
 - release more land for homes where people want to live;
 - build the homes we need faster;
 - get more people building homes;
 - support people who need help now.
- We will deliver the reforms proposed in the White Paper to increase transparency around the control of land, to "free up more land for new homes in the right places, speed up build-out by encouraging modern methods of construction and diversify who builds homes in the country" (p.70).
- We will consult and look to take action to promote transparency and fairness for leaseholders. We will look at the sale of leasehold houses and onerous ground rents, working with property developers, the Competition and Markets Authority and others as outlined in the Housing White Paper.

Key facts

Getting more homes built

- In 2016, the median house price in England was nearly eight times the median earnings – an all time record high.
- Home ownership among 25-34 year-olds in England has fallen from 56% in 2005/06 to 38% in

¹⁴ www.gov.uk/government/uploads/system/uploads/attachment_data/file/620838/Queens_speech_2017_background_notes.pdf

2015/16, whereas the percentage of 25-34 year-olds living in the private rented sector increased from 24% to 46% over the same time period.

- 189,650 net additional homes were delivered in 2015/16 in England, up 11% on 2014/15 and the highest level since 2007/08. We need to sustain that momentum to meet the affordability challenge. All credible sources agree we need between 225,000 and 275,000 new homes per year to tackle this problem ...”

David Elvin QC

Landmark Chambers

8 July 2017