PEBA National Conference 2017

Compulsory Purchase Update

Implications of the Neighbourhood Planning Act 2017

David Elvin QC

Introduction

1. The Neighbourhood Planning Act, completed its Parliamentary "ping pong" on 26 April 2017[1], received Royal Assent on 27 April 2017 and will have 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).

2. 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[2]. The CPO provisions apply to England and Wales only.

3. The Act amends existing CPO legislation, euphemistically often referred to as a "code", which is inconveniently spread across a number of Acts, principally:

   (1) Land Compensation Act 1961;

   (2) Compulsory Purchase Act 1965;

   (3) Land Compensation Act 1973;

   (4) Acquisition of Land Act 1981;

   (5) Compulsory Purchase (Vesting Declarations) Act 1981;

   (6) Greater London Authority Act 1999; and

   (7) Housing and Planning Act 2016.

4. In summary, Part 2 provisions introduces:

   (1) a general power to obtain temporary possession of land, together with a duty to compensate for it;

   (2) clarification as to the statutory framework for compensation, including what is meant

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

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

by the "no-scheme world", which latter amendment is intended to grapple with a complex issue which has for well over a century given rise to complexities and difficulties when assessing compensation;

(3) an ability for Transport for London and the Greater London Authority to jointly acquire land through compulsory purchase on behalf of each other for mixed-use transport, housing and regeneration purposes (and a power for subsidiary companies to override easements).

(4) a requirement for compulsory purchase orders to be brought into operation within a set period of time;

5. Following a brief consideration of the legislative history of the CPO provisions, this paper will address these main points in turn.

Brief legislative history

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

7. 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.

8. Royal Assent was given on 27 April 2017 (yesterday, in terms of the writing of this paper).

Principle areas of reform

(1) Temporary possession of land

9. The Government's Response to the consultation (September 2016) outlined the reasoning behind the proposal for new powers to take temporary possession of land:

> "66. All acquiring authorities may need to use land on a temporary basis: for example to store materials needed for the development which is the subject of the compulsory purchase order. There is a power to use land temporarily under Special Acts, Transport and Works Act Orders and power to enter and/or use land on a temporary basis is regularly sought in Development Consent Orders. However, compulsory purchase orders can only authorise the permanent acquisition of land or the acquisition of permanent new rights.
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> 67. The consultation sought views on making the compulsory purchase system fairer by giving all bodies with compulsory purchase powers the same power to temporarily enter and use land for the purposes of delivering their scheme."

10. Subject to ensuring sufficient safeguards and compensation, most consultees supported the proposal. Accordingly, Chapter 1 of Part 2 of the Act contained provisions headed "Temporary possession of land".

11. S. 18 provides:

> "**18. Power to take temporary possession of land**
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> (1) Subsection (2) applies where a person (an "acquiring authority")—
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> (a) has a power conferred by an Act to acquire land compulsorily (with or without authorisation from another person), or
>
> (b) is or has been, at any time, otherwise authorised to acquire land compulsorily.
>
> (2) The acquiring authority may, for purposes connected with the purposes for which it could acquire land compulsorily, take temporary possession of land—
>
> (a) by agreement, or
>
> (b) compulsorily, if authorised to do so in accordance with section 19.
>
> (3) Subject to any express provision in another Act, the power in subsection (2) is the only power under which a person may take temporary possession of land compulsorily.
>
> (4) For the purposes of this Chapter references to acquiring land include references to acquiring a right over land by creation."

12. The Lords by amendment had removed a previous requirement that temporary possession must be linked to a scheme for the acquisition of other land, either by compulsion or agreement.

13. S. 19 governs the procedure for authorising temporary possession under s. 18(2). In essence, it must be authorised by the type of instrument required for the compulsory acquisition of the land referred to in s. 18 e.g. a CPO. The authoring instrument can authorise the temporary possession of the land, as well as or even instead of, compulsory acquisition of that land: s. 19(3) (thus presumably allowing it to be included as an alternative). Where provision is made for temporary possession, the instrument is to be subject to the same procedures for authorising and challenging it as if the instrument only related to compulsory acquisition.

14. S. 19(4) and (5) does not require the authorising instrument insofar as it authorises the temporary possession of land to be subject to special parliamentary procedure (where that procedure is applied to compulsory acquisition) unless it is land held inalienably by the National Trust.

15. S. 19(7) requires the instrument to identify the land which is to be subject to temporary possession, describe the purposes for which temporary possession is required, and specify the total period of time of the temporary possession (but without providing the specific dates).

16. S. 20 requires acquiring authorities to give at least three months' notice to those with an

interest in the land and occupiers before taking temporary possession and requires the notice to specify the period for which the acquiring authority is to take temporary possession of the land. That notice period may be reduced by agreement: s. 20(6). A notice of intended entry may not be served more than three years after a compulsory purchase order becomes operative (and five years where the authorising instrument is not a CPO).

17. S. 21 provides that an "owner" (defined as someone having a freehold interest in or a leasehold interest in, and right to occupy, the land) of the land may serve a counter-notice on the acquiring authority within 28 days of the notice of their intended entry limiting the period for which the acquiring authority may take temporary possession to either 12 months in the case of a dwelling (or part of a dwelling) or six years in any other case. In addition, a leaseholder can opt under s. 21(3) to require the acquiring authority not to take temporary possession – thus requiring it to elect either to permanently acquire the lease or not to proceed with it at all.

18. Under s. 21(5) to (7) the acquiring authority may then either accept the counter-notice and (where applicable) limit the period of temporary possession as requested, withdraw the notice of intended entry or compulsorily purchase the owner's interest in the land, and must give notice of its decision to the owner within 28 days of the counter-notice. Where the authority elects to acquire, S. 21(8) deems the instrument authorising temporary possession to be treated as authorising compulsory acquisition and to proceed as if it had given any notice or taken any step required in relation to the authorisation or confirmation of the instrument.

19. The reference to leasehold owners with "the right to occupy land" presumably means that it is entitled to occupy not that it is in actual occupation. This appears to exclude lessees who have a reversionary lease only where the right to occupy vests in a sub-tenant. Indeed, it may have been intended that the provisions apply to "occupiers" – the Explanatory Notes state in an imprecise manner (since the provisions do not appear to apply to occupiers who do not have a leasehold interest):

> "61 This clause requires acquiring authorities to give at least three months' notice to those with an interest in the land and occupiers before taking temporary possession and requires the notice to specify the period for which the acquiring authority is to take temporary possession of the land."

20. The Consultation Response in Sept 2015 was equally imprecise:

> "69. Other points included that acquiring authorities should be allowed to acquire land temporarily or permanently but not both and that owners and occupiers should be able to request that land is taken permanently as an alternative."

21. S. 22 applies the enforcement provisions in s. 13 of the Compulsory Purchase Act 1965 (where an owner or occupier of the land refuses to give up land to an acquiring authority). The effect is that references in that Act to taking possession of land are taken to be references to taking temporary possession of land. Accordingly, where a person refuses to give up possession of the land, an acquiring authority can issue their warrant to a sheriff or

enforcement officer to gain possession of the land on its behalf.

22. S. 23 deals with compensation. Those with an interest in the land, or a right to occupy the land, are entitled to compensation for any loss or injury sustained as a result of the temporary possession. The provisions was amended by the House of Lords to include compensation for a "beneficial claimant" for loss suffered where a relevant right or interest annexed to land belonging to them has been interfered with, or a contractual user restriction has been breached by an acquiring authority: s. 23(3)[3].

23. Compensation must take into account the value of a leasehold interest in the land for the period of temporary possession. Losses incurred by disturbance of business or trade on the relevant land is included: see s. 23(4)-(5). Any disputes about compensation payable may be referred to the UT Lands Chamber.

24. For limitation purposes, the cause of action is treated as accruing on the last day of the period of possession: s. 23(6). Interest runs on compensation from the day after the last day on which the loss of injury occurs: s. 23(7).

25. Mirroring equivalent provisions for land compulsorily acquired, s. 24 provides for claimants and beneficial claimants to seek advance payment of 90% of the compensation claim, with interest payable on late payments beginning with the date after the date or the end of the period specified in s. 24(6).

26. Temporary possession land is to be included in the list of categories of land which are "blighted land" under the TCPA 1990, and the recent right to enter and survey land in s. 172 of the Housing and Planning Act 2016 is extended to make it available in connection with temporary possession: see s. 26.

27. S. 27 sets out the powers of an acquiring authority once temporary possession has been obtained. The acquiring authority is enabled to use the land as if it had acquired all interests in it and, in particular, has the power to remove or erect buildings or other works and remove any vegetation (even if such uses would interfere with relevant rights, e.g. an easement, or a restrictive covenant or contractual restriction). Restrictions apply to land held inalienably by the National Trust. Importantly, s. 27(4) provides that the authority may only use the land for the purposes for which temporary possession was required, as described in the authorising instrument[4].

28. S. 28, added by the House of Lords, deals with "Impact of temporary possession on tenancies etc". Where the relevant land is subject to a tenancy, the terms and obligations of the tenancy, except for payment of rent and the term, are not to be treated as being breached to the extent that the temporary possession prevents reasonable compliance with them: s. 28(2). A business tenant under the Landlord and Tenant Act 1954 is deemed

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[3] Apparently intended to apply to contractual restrictions and restricted covenants, conferring the right on such a claimant where that person is an original party to the contract or has land which is benefited by the restriction.

[4] For CPOs generally see ***R (Argos Ltd.) v. Birmingham CC*** [2012] J.P.L. 401.

to occupy land continuously throughout a period of temporary possession, for the purposes of security of tenure under that Act: s. 28(5).

29. Regulations under s. 29 must make provisions for the reinstatement of land subject to temporary possession, and the resolution of disputes about reinstatement.

30. Regulations may also make provision for a number of matters, including: the authorisation and exercise of the power to take temporary possession; limiting the period for temporary possession; limiting the circumstances in which temporary possession can be taken and the types of land which may be subject to it. There must be public consultation on draft regulations: s. 29(5).

(2) Compensation

31. 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 with a new self-contained statutory code, the Explanatory Notes drafted when the Bill moved from the Commons to the Lords in December 2016[5] 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."

The "no-scheme world" rules

32. Of the many complexities in the law of compensation for compulsory purchase, few have proved as difficult to operate as the "no scheme world" hypothesis. The Law Commission (in its consultation paper and final reports which Government largely ignored at the time[6]) wrote in its Consultation Paper **Towards a Compulsory Purchase Code (1): Compensation** (2002, Consultation Paper No 165)[7]:

> "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"[8]. 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

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

[6] 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.

[7] See the CP Section 6.

[8] ***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.

> 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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> 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."

33. The Report **Towards A Compulsory Purchase Code: (1) Compensation** (Law Com No. 286, December 2003) 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.

34. 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."

35. 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.

36. The explanation for the new provisions is found in the Government's Consultation Response (Sept 2016)[9]:

> "7. A core principle of compulsory purchase compensation is that land should be acquired at

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

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'.

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.

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:

- 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"

37. 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.

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.

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 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."

38. The latest version of the Explanatory Notes state:

"85. 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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> 86. 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 and around 100 years of case law on these provisions and their predecessors."

39. 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.

40. 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."

41. The new provisions do not meet one of the points made by the Law Commission, namely that they do not make clear whether they replace or supplement the judicial construct of the no-scheme world. The LC had proposed a provision which would have made the position absolutely clear[10]:

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

42. The language of the new s. 5(2A) 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.

43. 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…"

44. 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

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

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.."

45. 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.

46. S. 6D(6) appears to mirror s. 14(5)(d) of the `961 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."

47. There is then made explicit what is to happen if the scheme has either a beneficial effect on the value of other land held by the person whose interest is acquired or there is an acquisition of other land originally subject to a claim for injurious affection:

(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)).

48. The 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))".

49. Disputes are to be determined by the Lands Chamber in accordance with s. 6D(5) subject to the following:

> "(a) the underlying scheme is to be taken to be the scheme provided for by the Act, or other instrument, which authorises the compulsory acquisition unless it is shown (by either party) that the underlying scheme is a scheme larger than, but incorporating, the scheme provided for by that instrument, and
>
> (b) except by agreement or in special circumstances, the Upper Tribunal may permit the acquiring authority to advance evidence of such a larger scheme only if that larger scheme is one identified in the following read together—
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> (i) the instrument which authorises the compulsory acquisition, and
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> (ii) any documents made available with it."

50. Subsections (2) to (5) provide for special cases including under s. 6D(3) and (4) where

> "land is acquired for regeneration or redevelopment which is facilitated or made possible by a relevant transport project"

51. A "relevant transport project" [11]

> "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)"

52. 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" and meets the requirements of s. 6E(2):

(1) The Scheme includes only such projects if "regeneration or redevelopment was part of the published justification for the relevant transport project";

(2) The works are first opened for use after 5 years beginning with the date on which s. 32 of the 2017 Act comes into force;

(3) The instrument authorising compulsory acquisition was made or prepared in draft on or after the date on which s. 32 of the 2017 Act comes into force;

(4) The compulsory acquisition of that land is authorised before the end of the period of

[11] Defined by s. 6D(4)(a).

5 years beginning with the day on which the works comprised in the relevant transport project are first opened for use; and

(5) that land is in the vicinity of land comprised in the relevant transport project.

53. The provisions in s. 6E(2) limit the scope of the disregard of the scheme under s. 6A where such a transport project is involved since it creates a disregard which goes beyond the immediate purpose of the compulsory acquisition but to cases where the regeneration or redevelopment is "is facilitated or made possible" by a transport project and where that transport scheme may not take place at the same time as the regeneration or redevelopment.

54. See also s. 14(5)(d) of the 1961 Act which states as part of the planning assumptions –

> "(d) if the scheme was for use of the relevant land for or in connection with the construction of a highway ("the scheme highway"), that no highway will be constructed to meet the same or substantially the same need as the scheme highway would have been constructed to meet."

The new provisions appear to cast the disregard wider than the s. 14 planning disregard which is where the scheme was for use of the relevant land "for or in connection with the construction of a highway".

55. There is a limited exception to the relevant transport scheme disregard in s. 6E(3):

> "(3) In assessing compensation payable to a person in respect of the compulsory acquisition of that land, the scheme is to be treated as if it did not include the relevant transport project if the person acquired the land—
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> (a) after plans for the relevant transport project were announced, but
>
> (b) before 8 September 2016[12]."

56. This provides for a limited exemption for disregarding a scheme involving relevant transport projects where the owner acquired the land before First Reading of the Bill and after the plans for the project were announced.

57. On 22.2.17, the Supreme Court gave judgment in ***JS Bloor (Wilmslow) Ltd v. Homes & Communities Agency*** [2017] UKSC 12, [2017] R.V.R. 110, a case concerning 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. 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; [2004] UKHL 19, 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

[12] The day after the Bill received its First Reading in the House of Commons.

> 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."

58. 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."

Compensation where permission for additional development is granted after acquisition

59. Part 4 of the Land Compensation Act 1961 provides that compensation is payable if the acquiring authority obtains a more valuable planning permission on the land taken than was envisaged by the scheme and which could have been obtained by the claimant.

60. S. 33 repeals Part 4.

61. The Government's Consultation Response summarises the responses as follows:

> "56. More than half of the respondents supported the repeal of Part 4 of the Land Compensation Act 1961. Those respondents expressed the view that claimants already have the right to get the benefit of planning consents in place at the valuation date, as well as any reasonably foreseeable consent which may be given and therefore there is no need to retain Part 4.
>
> 57. Those who did not support the proposal acknowledged that the provision is seldom used. However, some commented that there are still cases where a more valuable planning permission is granted within 10 years and they considered that this may increase in the future due to the number of infrastructure schemes happening. Others felt that the provision was still useful but was in need of reform to make it easier to use."

62. On this basis, the Government concluded that -

> "Part 4 ought not to be necessary as the prospects for obtaining planning permission in the future should already be taken into in the statutory planning assumptions underlying the assessment of compensation".

63. At the Report Stage in the Commons, an amendment was tabled (but not called) for the removal of this clause on the basis that it would "prevent landowners who have had land compulsorily purchased for a particular purpose from seeking additional compensation should the land end up being used for a different, more lucrative development".

64. As a result of the repeal, a claimant will no longer be entitled to claim additional compensation where, within 10 years of the completion of the compulsory purchase by the acquiring authority, a planning decision is made granting consent for additional development on the land. Development potential falls to be considered and assessed in accordance with the amended s. 14 of the 1961 Act.

Compensation for disturbance in respect of land subject to a business tenancy

65. S. 35 is directed towards correcting a disparity in the assessment of disturbance compensation between different types of tenancy/licence to occupy.

66. The Government's Consultation Response notes:

> "28. Under the current rules licensees with no interest in the land are entitled to more generous compensation than short-term tenants and lessees with a break clause in their leases. This is because in assessing compensation entitlement for licensees account is taken of the period for which the land occupied by the tenant might reasonably have been expected to be available for the purpose of their trade or business. While for short-term tenants and lessees with a break clause in their leases it is assumed that the landlord terminates the tenant's interest at the first available opportunity following notice to treat, whether that would happen in reality or not.
>
> 29. The government wants to ensure that compensation entitlement where land is acquired by compulsion is fair to all claimants. The consultation therefore, sought views on amending the legislation to put the assessment of compensation for short term tenants and lessees with a break clause in their leases on the same footing as licensees with no interest in the land."

67. For business tenancies protected by the Landlord and Tenant Act 1954 ("the 1954 Act"), the right of a tenant to apply for a new tenancy is taken into account in the assessment of compensation for the acquisition of the interest of the landlord or tenant.

68. The current position for so-called "minor tenancies" (a tenancy with less than a year left to run, or a tenancy from year to year) and for tenancies not protected by the 1954 Act is governed by ***Bishopsgate Space Management v. London Underground*** [2004] 2 EGLR 175. In this case, the Tribunal held that, for such tenancies, it must be assumed that the landlord would terminate the tenant's interest at the first available opportunity following notice to treat, whether or not that would happen in reality.

69. S. 35, by substituting an amended s. 47 of the Land Compensation Act 1973, rectifies the disparity by equalising the assessment of compensation for disturbance for minor and unprotected tenancies with that for licensees and protected business tenancies. Regard in all cases should be had to the likelihood of the tenancy to be continued or renewed, the period for which the tenancy might reasonably have been expected to be renewed or continued, and the terms and conditions of such a tenancy. The new version of s. 47(2) and (4) requires it to be assumed in assessing compensation under that provisions that –

> "neither the acquiring authority nor any other authority possessing compulsory purchase powers have acquired or propose to acquire any interest in the land"

Advance payments of compensation

70. Ss. 38-40 make a number of technical amendments to the provisions on advance payments of compensation in the Land Compensation Act 1973 (regarding timing and interest).

Compensation for temporary severance of land after vesting declaration

71. Provision is made for the situation in which an authority executes a general vesting declaration and enters on the part of a claimant's land that it needs for the scheme. This entry occurs while a material detriment claim is being considered by the Tribunal. If the Tribunal eventually determines that additional land must be acquired, the issue arises as to compensation for the temporary severance of the land the authority planned to take from the additional land the authority became required to take. S. 41 inserts a new para. 16(4) into Schedule A1 of the Vesting Declarations Act 1981 Act to provide that the Upper Tribunal's powers includes the power to award such compensation.

(3) GLA/Mayoral development corporation and TfL: joint acquisition of land and the overriding of easements

72. S. 36 resolves an existing problem whereby Transport for London ("TfL") can seek compulsory purchase powers only for transport and highways purposes, and the Greater London Authority ("GLA") can seek compulsory purchase powers only for housing and regeneration purposes. Only principal local authorities are capable of promoting a joint compulsory purchase order (on cross-boundary sites). Significant support for remedying this issue, so as to potentially increase housing development on surplus or underused public sector land, was received by the Government during consultation. New ss. 403A and 403B are inserted into the Greater London Authority Act 1999

73. Where the GLA (or a MDC) and TfL agree that the purposes for which they may acquire land compulsorily would be advanced by one or both of them acquiring land for a joint project.

74. The latest version of the Explanatory Notes refer to the clause as follows:

> "105 Transport for London ('TfL') can seek compulsory purchase powers only for transport and highways purposes, and the Greater London Authority ('GLA') can seek compulsory purchase powers only for housing and regeneration purposes.
>
> 106 This clause applies where the GLA and TfL agree that the purposes for which they may acquire land compulsorily would be advanced by one or both of them acquiring land for a joint project. The purposes for which the GLA may acquire land are extended to include those of TfL. Similarly, the purposes for which TfL may acquire land are extended to include those of the GLA. This therefore enables either body to acquire all the land required for a combined transport and regeneration or housing scheme on behalf of the other."

75. The Act also corrects a problem that arose for the GLA and TfL when seeking to exercise the power to override easements in ss. 203-206 of the Housing and Planning Act 2016

(formerly found in s. 237 of the TCPA 1990). The problem emerged because the GLA and TfL can only carry on particular specified activities for a commercial purpose through a taxable body. As a result, they created and work through land-holding subsidiary companies. However, these companies do not have independent compulsory purchase powers. Complex amendments are made by s. 37 to address this issue to ensure that the power to override easements in the 2016 Act can be exercised by companies acting on behalf of the GLA or TfL.

(4) Time limit for confirmation notices

76. As noted by the Government's Consultation Response-

> "[w]hilst most acquiring authorities are keen to bring a confirmed order into effect at the earliest opportunity, there is no statutory requirement for a notice to be published within a specific timescale".

77. Where a compulsory purchase order is confirmed by the confirming authority (the authority with the power to authorise the acquiring authority's compulsory acquisition), the acquiring authority is required to:

(1) serve a confirmation notice upon every owner, tenant and occupier;

(2) affix a confirmation notice on or near the land comprised in the compulsory purchase order; and

(3) publish a confirmation notice in one or more local newspapers circulating in the locality in which that land is situated.

78. S. 34 amends section 15 of the Acquisition of Land Act 1981 by introducing a six week statutory time limit for issue of the confirmation notices unless a longer period is agreed in writing between the acquiring authority and the confirming authority. It also provides for the confirming authority to issue the confirmation notices, and recover the costs of doing so, where an acquiring authority fails to do so.

David Elvin QC

Landmark Chambers

28 April 2017