

DEVELOPMENT CONSENT ORDERS AND COMPULSORY PURCHASE

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Introduction

1. Most of us are familiar with various statutory provisions which empower public authorities to acquire land compulsorily, we may be slightly less familiar with the relatively new and wide ranging power to seek compulsory acquisition rights when applying for an order granting development consent under the Planning Act 2008 (“PA 2008”).
2. The Planning Act 2008 introduced a new regime for granting consent for nationally significant infrastructure projects (“NSIPs”). One of the main aims of the new regime is to provide a comprehensive regime or “one stop shop” for those promoting major infrastructure projects.
3. Orders granting development consent (“DCO”) may include provision for compulsory purchase of land.
4. The purpose of this paper is to consider the extent of the compulsory purchase power, and the procedure to be followed.
5. I do not intend to set out comprehensive guidance, but to point to some issues of interest and importance.

The Powers

6. Pascoe v. Secretary of State¹ provides a reminder, that when considering whether compulsory acquisition should be authorised, the decision maker must consider the precise ambit of the statutory power on which the acquiring authority relies.
7. Section 122 of the PA 2008 provides:

122 Purpose for which compulsory acquisition may be authorised

(1) An order granting development consent may include provision authorising the compulsory acquisition of land only if the decision-maker is satisfied that the conditions in subsections (2) and (3) are met.

(2) The condition is that the land—

(a) is required for the development to which the development consent relates,

(b) is required to facilitate or is incidental to that development, or

(c) is replacement land which is to be given in exchange for the order land under section 131 or 132.

¹ [2007] 1 WLR 885

(3) The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily.

8. The effect of section 122 is to set two main pre-conditions to the inclusion of compulsory purchase powers in a DCO.
9. First the decision-maker must be satisfied that the land is “required” for the stated purpose. The word “required” was included in section 226(1)(a) of the Town and Country Planning Act 1990 (“TCPA 1990”) prior to its amendment by the Planning and Compulsory Purchase Act 2004². The meaning of the word “required” in that statute was considered by the Court of Appeal in Sharkey and Another v Secretary of State for the Environment and South Buckinghamshire District Council³. McGowan LJ giving the leading judgment endorsed the approach taken by Roch J and stated:

I agree with Roch J. that the local authority do not have to go so far as to show that the compulsory purchase is indispensable to the carrying out of the activity or the achieving of the purpose; or, to use another similar expression, that it is essential. On the other hand, I do not find the word “desirable” satisfactory, because it could be mistaken for “convenient,” which clearly, in my judgment, is not sufficient. I believe the word “required” here means “necessary in the circumstances of the case.”

10. Guidance Related to Procedures for Compulsory Acquisition (DCLG February 2010) (issued under section 124 PA 2008) sets out general considerations which are to be applied when considering whether compulsory acquisition is justified. The following guidance is given (at paragraph 24):

The first criterion is that the land is required for the development to which the development consent relates. For this to be met, the promoter should be able to demonstrate to the satisfaction of the decision-maker that the land in question is needed for the development for which consent is sought. The decision-maker should be satisfied, in this regard, that the land to be acquired is no more than is reasonably required for the purposes of the development

11. A similar approach to that taken in Sharkey is likely to be taken when construing the word “required” in section 122(2) of the PA 2008.
12. The second condition which has to be satisfied is that there is a compelling case in the public interest for the land to be acquired compulsorily (section 122(3) PA 2008). The effect of that provision is to elevate the guidance given in paragraph 17 of the Memorandum to Circular 06/04 into a statutory requirement.
13. In practice it is necessary, when considering confirmation of any CPO, to address the question of whether there is a compelling case in the public interest, in order to address the policy in the Circular and in order to address considerations arising when Article 1 Protocol 1 and Article 8 (European Convention on Human Rights (“ECHR”)) rights are engaged. As a result the addition of a statutory test is unlikely to change the way in which confirmation of

² The following words appeared in section 226(1)(a) TCPA 1990 prior to its amendment: "suitable for and required in order to secure the carrying out of development, re-development or improvement". The word “required” appears in section 226(1)(b) TCPA 1990

³ (1992) 63 P. & C.R. 332

CPO's (or in the case of DCO, inclusion of powers of compulsory acquisition) is likely to be approached.

14. Section 123 PA 2008 provides that the decision maker has to be satisfied that one of three conditions has been met, in order to include a provision for compulsory acquisition:

123 Land to which authorisation of compulsory acquisition can relate

(1) An order granting development consent may include provision authorising the compulsory acquisition of land only if the decision-maker is satisfied that one of the conditions in subsections (2) to (4) is met.

(2) The condition is that the application for the order included a request for compulsory acquisition of the land to be authorised.

(3) The condition is that all persons with an interest in the land consent to the inclusion of the provision.

(4) The condition is that the prescribed procedure has been followed in relation to the land.

15. The alternatives contained in subsections (3) and (4) appear to contemplate that the original application for a DCO omitted to include provision for compulsory acquisition. The "prescribed procedure" referred to at subsection (4) is that prescribed in The Infrastructure Planning (Compulsory Acquisition) Regulations 2010 ("the Compulsory Acquisition Regulations 2010"). Those regulations allow additional land to be subject to compulsory acquisition powers, although that land was not included in the original application for the DCO.
16. Section 124 PA 2008 provides that the Secretary of State may issue guidance about the making of a DCO which includes provision authorising compulsory purchase and that if he does, regard must be had to it. Guidance has been issued under section 124: Guidance Related to Procedures for Compulsory Acquisition (DCLG February 2010) ("the February 2010 Guidance").
17. Section 125 PA 2008 applies the compensation code to compulsory acquisitions under a DCO, with some omissions (in particular section 10 of the Compulsory Purchase Act 1965).
18. The PA does not apply the provisions of the Compulsory Purchase (Vesting Declarations) Act 1981 ("CPVDA 1981"). However, if model provision 23 in Schedule 1 to the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 ("the Model Provisions Order") is included in the DCO, the CPVDA 1981 will be applied.
19. Section 126 PA 2008 prevents a DCO modifying the existing compensation code either by adding to or subtracting from its provisions.
20. Sections 127-132 PA 2008 make provision for special kinds of land in a way that is similar to Part III of the Acquisition of Land Act 1981, including provision for special parliamentary procedure.
21. Section 133 PA 2008 is an equivalent provision to section 30 of the Acquisition of Land Act 1981 ("ALA 1981"); it disapplies the provisions relation to special kinds of land when considering acquisition of existing rights to store gas underground and creation of new rights to store gas underground.
22. The powers of compulsory acquisition in the PA 2008 remove some of the anomalies in the current range of powers. For example the compulsory acquisition powers in sections 11 and 12 of the Pipe-lines Act 1962 are subject to special parliamentary procedure. Under the PA a

promoter of a pipe-line project will be able to seek compulsory acquisition powers under the PA. As a result negotiations to acquire land or rights for pipe-lines by agreement are likely to be easier for the promoter than they may have been in the past.

23. Under the Planning Act 2008 those promoting NSIPs are able to seek powers of compulsory acquisition. The effect of the compulsory purchase powers may be to enable one company to acquire compulsorily land held by another company or private individual. Compulsory Acquisition by private organisations is not a departure from previous practice; many railway companies were granted such rights under private Bills and under Transport and Works Act 1992 orders. However development consent can be granted for wide range of projects and can also include “associated development” (as defined in section 115 PA 2008).

Procedure

24. I do not set out the procedure by which a DCO is applied for, and do not refer to the extensive requirements of the pre-application procedure set out in Chapter 2 of the PA 2008. I draw attention to a number of issues of particular relevance to DCOs containing compulsory acquisition powers.
25. I refer to the law as it stands. If the Localism Bill is enacted the IPC will be replaced by the Major Infrastructure Planning Unit, and decisions will be made by the relevant Secretary of State.

The Application for the DCO

26. An application for a DCO (under section 37 PA 2008) can contain provisions for compulsory acquisition. The Model Provisions Order contains provisions authorising the acquisition of land and rights.
27. The application for a DCO which would authorise compulsory acquisition of land or an interest in land or right over land must be accompanied by:
- a. A statement of reasons
 - b. A statement to indicate how the proposed order is to be funded
 - c. Land plan
 - d. Where land falls into one of the special categories, it must be specified in the book of reference.
28. Regulation 5(2)(h) of The Infrastructure Planning (Applications: Prescribed Forms and Procedures) Regulations 2009 (“the APR 2009”) provides:

(h) if the proposed order would authorise the compulsory acquisition of land or an interest in land or right over land, a statement of reasons and a statement to indicate how an order that contains the authorisation of compulsory acquisition is proposed to be funded;

29. Guidance on the content and form of the statement of reasons is given at Annex 2 to the February 2010 Guidance. The statement of reasons is to include a statement of the promoter’s justification for compulsory acquisition including reference to how regard has been had to the European Convention on Human Rights (“ECHR”).
30. Regulation 7 of the APR 2009 makes provision for the content of the book of reference. Regulation 7(1)(e) provides:

(e) in Part 5 specifies land—

(i) the acquisition of which is subject to special parliamentary procedure;

(ii) which is special category land;

(iii) which is replacement land; and

for each plot of such land within which it is intended that all or part of the proposed development and works shall be carried out, the area in square metres of that plot.

31. Guidance on the plan which must accompany an application for a DCO authorising compulsory purchase is given in Annex 3 of the February 2010 Guidance.

Notice to the IPC

32. If the application for the DCO includes a request for compulsory purchase powers, the applicant must give the commission a notice specifying the names of each person having an interest in the land to which the compulsory purchase relates (“the affected persons”) (section 59 PA 2008).

Alternative Dispute Resolution

33. The February 2010 Guidance indicates that promoters will be urged to offer affected persons full access to alternative dispute resolution techniques (paragraph 42).
34. It would appear that disputes about acquisition of particular parcels of land may be able to be resolved by ADR, but those interested in the land would be well advised to maintain their objections until any dispute is settled.

Examination

35. Section 92 PA 2008 makes provision for compulsory acquisition hearings.
- a. If the DCO includes compulsory acquisition powers those affected are given the right to a compulsory acquisition hearing.
 - b. If at least one affected person notifies the IPC, a compulsory acquisition hearing must be held.
 - c. At a compulsory acquisition hearing the applicant and each affected person is entitled to make oral representations about the compulsory acquisition request.
36. The examining authority fixes a date by which an affected person must notify the IPC that he or she wishes a compulsory acquisition hearing to be held (section 92(2) PA 2008). At least 21 days notice of the deadline must be given⁴.
37. If a compulsory acquisition hearing is to be held, affected persons must be given at least 21 days notice of the hearing⁵.
38. The Examining authority may consider all compulsory acquisition requests relating to the same application at the same compulsory acquisition hearing or at separate compulsory acquisition hearings⁶.
39. There is no right to cross-examine. The examining authority has a discretion whether to allow questioning.

⁴ Rule 13(1) of the Infrastructure Planning (Examination Procedure) Rules 2010

⁵ Rule 13(3) of the Infrastructure Planning (Examination Procedure) Rules 2010

⁶ Rule 15(2) of the Infrastructure Planning (Examination Procedure) Rules 2010

40. Section 94(7) PA 2008 provides:

(7) In making decisions under subsection (4)(a), the Examining authority must apply the principle that any oral questioning of a person making representations at a hearing (whether the applicant or any other person) should be undertaken by the Examining authority except where the Examining authority thinks that oral questioning by another person is necessary in order to ensure—

(a) adequate testing of any representations, or

(b) that a person has a fair chance to put the person's case.

41. Rule 14(5) and (6) of the Infrastructure Planning (Examination Procedure) Rules 2010 (“the Procedure Rules”) provides:

(5) The Examining authority shall be responsible for the oral questioning of a person giving evidence (“ A ”) except where, in the view of the Examining authority, oral questioning of A by another person (“ B ”) is necessary in order to ensure—

(a) adequate testing of any representation; or

(b) that B has a fair chance to put B's case.

(6) The Examining authority may refuse to permit the oral questioning of persons giving evidence, or may require such questioning to cease, if it appears to the Examining authority that permitting such questioning or allowing it to continue (as the case may be) would have the effect that the timetable referred to in rule 8 could not be met.

42. It will be interesting to see whether the procedures withstand challenges based upon Article 6 of the ECHR. The outcome of any such challenge is likely to depend, in large measure, on how the examining authority conduct hearings and the extent to which they allow the applicant for the DCO’s evidence to be tested by an affected person.

Notice following making of DCO

43. Once a DCO including provision for compulsory acquisition of land has been made, section 134 PA 2008 makes provision for the service of a compulsory acquisition notice on all those who would be a qualifying person under section 12(1) ALA 1981. Notice also has to be posted on site and in one or more newspapers circulating in the area. The notice (in the form prescribed in the Compulsory Acquisition Regulations 2010 (Form C), must (inter alia) state that a person aggrieved may challenge the DCO in accordance with section 118 PA 2008.

44. Clause 118 of the Localism Bill (if enacted) would remove the obligation to serve a copy of the DCO on all qualifying persons. That requirement would be replaced with a requirement to make a copy of the DCO available at a place in the vicinity of the land.

Challenging a DCO

45. The means of challenge to a DCO are by judicial review, although a six week time limit is imposed (Section 118 PA 2008). Section 118 combines the legal certainty (and therefore avoids the problems identified in Uniplex⁷) associated with the six week period applied to

⁷ Uniplex (UK) Limited v. NHS Business Services Authority [2010] P.T.S.R. 1377 (ECJ)

statutory challenges under section 288 TCPA 1990, whilst also incorporating the filter provisions of the judicial review permission stage. The stipulation of a six week period is also consistent with section 23(4) ALA 1981.

Conclusions

46. The system of DCOs introduced by the Planning Act 2008 introduces the ability for applicants to incorporate extensive powers of compulsory acquisition in orders granting development consent orders.
47. Those advising applicants will need to make sure that appropriate provisions are included in an application for a DCO.
48. Those advising landowners will have to be careful to comply with the relevant procedures in order to ensure access to the tribunal that will determine whether the land will be acquired.
49. In the past, those whose land is proposed to be acquired compulsorily have been afforded the opportunity to put their case to a tribunal and to cross examine witnesses, whether at a public inquiry or before a Parliamentary committee. The provisions contained in the Planning Act 2008 create a presumption that it will be the examining authority and not the person whose land is to be taken against his or her will who should ask questions of those who give evidence on behalf of an applicant who proposes to take it.

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