

Nationally Significant Infrastructure Projects: Compulsory Acquisition

Jacqueline Lean

- The test for inclusion of compulsory acquisition powers
- Temporary use/possession of land
- Compensation & funding
- Costs

Planning Act 2008

“120— **What may be included in order granting development consent**

(1) An order granting development consent may impose requirements in connection with the development for which consent is granted.

[...]

(3) An order granting development consent may make provision relating to, or to matters ancillary to, the development for which consent is granted.

(4) The provision that may be made under subsection (3) includes in particular provision for or relating to any of the matters listed in Part 1 of Schedule 5.”

Schedule 5 matters

- The acquisition of land, compulsorily or by agreement (para 1)
- The creation, suspension or extinguishment of, or interference with, interests in or rights over land (including rights of navigation over water), compulsorily or by agreement (para 2)
- The payment of compensation (para 36)

The test

“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 Secretary of State 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.

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

“Required?”

- ***Sharkey and Another v Secretary of State for the Environment and South Buckinghamshire District Council* (1992) 63 P. & C.R. 332.:**

*“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.”**”*

DCLG Guidance

- S.122(2)(a) – SoS *“will need to be satisfied that the land to be acquired is no more than is reasonably required for the purposes of the development”*
- S.122(2)(b) – SoS *“will need to be satisfied that ... the land to be taken is no more than is reasonably necessary for that purpose and is proportionate”*
- S.122(2)(c) – SoS *“will need to be satisfied ... that no more is being taken that is reasonably necessary for that purpose, and that what is proposed is proportionate”*

DCLG ‘Planning Act 2008. Guidance related to the procedures for the compulsory acquisition of land’ (Sept 2013)

Compelling case in the public interest?

DCLG Guidance

- *“For this condition to be met, the SoS will need to be satisfied that there is compelling evidence that the public benefits that would be derived from the compulsory acquisition will outweigh the private loss that would be suffered by those whose land is to be acquired. Parliament has always taken the view that land should only be taken compulsorily where there is clear evidence that the public benefit will outweigh the private loss” (para 13)*
- *“There may be circumstances where the Secretary of State could reasonably justify granting development consent for a project, but decide against including in an order the provisions authorising the compulsory acquisition of the land....” (para 16)*

R (oao FCC Environment (UK) Ltd) v Secretary of State for Energy & Climate Change [2015] EWCA Civ 55

- Issue: S.122(3) satisfied where NPS establishes an urgent need for development?
- Mitting J [2014] EWHC 947 (Admin) at [18]:
 - *“For my part, I find it difficult to conceive of circumstances in which the Panel in applying statutory guidance, as it must, which established an urgent need for development, could legitimately conclude that there was not a compelling case as a necessary element of the scheme, justifying compulsory acquisition of rights in land. To that extent, the established distinction between tests for grant of planning consent and the grant of a power of compulsory acquisition.... have been modified by statute”*

*R (oao FCC Environment (UK) Ltd) v Secretary of State
for Energy & Climate Change [2015] EWCA Civ 55*

- Common ground that that was not correct approach
- Position as set out in SS's skeleton argument (CA judgment para 10)
 - Where application includes proposed powers of compulsory acquisition, in assessing whether there is a compelling case in the public interest, decision-maker has to make that assessment in accordance with the contents of any relevant NPS: s.104(3);
 - But fact NPS establishes an urgent need does not mean the test in s.122(3) is automatically and necessarily met. It may be possible to meet the need without the use of requested powers of compulsory acquisition.

R (oao FCC Environment (UK) Ltd) v Secretary of State for Energy & Climate Change [2015] EWCA Civ 55

- 3 examples given by SS (CA judgment para 11):
 - Land proposed to be acquired may be excessive because development proposals can be constructed without needing that land to be acquired;
 - Acquisition of a right over the land, rather than its acquisition, might suffice;
 - Land may be necessary for the development, but landowner may be willing to agree to sell

S.122 – other matters

- Applicant should be able to demonstrate that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored (DCLG Guidance para 8)
 - See consideration in ***FCC*** (paras 12-30) & ***R (Mars Jones) v Secretary of State for Business Energy and Industrial Strategy*** [2017] EWHC 1111 (Admin) (paras 54-62)

- SS must be satisfied that purposes for which compulsory acquisition sought are legitimate and sufficient to justify interference with property rights, having regard to ECHR Art 8 and A1P1 (DCLG Guidance para 10)
 - See consideration in ***R(oao Scarisbrick) v Secretary of State for Communities and Local Government*** [2017] EWCA Civ 787

Lesser interference – temporary use of land?

- Planning Act 2008 does not, in terms, provide for temporary use/possession of land as opposed to compulsory acquisition of land / rights or for general power to use temporarily land which may be compulsory acquired
 - Cf (eg) **High Speed Rail (London-West Midlands) Act 2017 Sch 16 para 1**
 - (1) The nominated undertaker may enter upon and take possession of the land specified in the table in Part 4 of this Schedule—
 - (a) for the purpose specified in relation to the land in column (3) of the table in connection with the authorised works specified in column (4) of the table,
 - (b) for the purpose of constructing such works as are mentioned in column (5) of the table in relation to the land, or (c) otherwise for Phase One purposes.
 - (2) The nominated undertaker may (subject to paragraph 2(1)) enter upon and take possession of any other land within the Act limits for Phase One purposes.

Lesser interference – temporary use of land?

- **The Infrastructure Planning (Model Provisions) (England and Wales) Order 2009** includes model provisions for:
 - Temporary use of identified land (model provision 28)
 - 14 day notice period
 - Compensation payable for loss or damage arising from exercise of the powers
 - Temporary use of land for maintaining the authorised project (model provision 29)
 - 28 day notice period
 - Does not apply to house or garden, or occupied building
 - Compensation payable for loss or damage arising from exercise of the powers

Lesser interference – temporary use of land?

Neighbourhood Planning Act 2017 S.18 (not yet in force)

“Power to take temporary possession of land

(1) Subsection (2) applies where a person (an “acquiring authority”)—

(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.”

Lesser interference – temporary use of land?

- **Procedure: Neighbourhood Planning Act 2017 s.19**
 - The authorising instrument
 - May make provision relating to the temporary possession of land as well as, or instead of, compulsory acquisition
 - If it authorises compulsory acquisition of land, may authorise temporary possession of the same or other land
 - Must identify the land which is to be subject to temporary possession
 - Must describe the purposes for which temporary possession is required; and
 - Must specify the total period of time for which the land may be subject to temporary possession

Lesser interference – temporary use of land?

- **Notice:**
 - Not less than 3 months (s.20(3)) unless a shorter period agreed (s.20(6))
 - Must specify period for which temporary possession is required
- **Freehold owner/leaseholder with right to occupy may serve counter-notice within 28 days**
 - Stating that total period of land for which temporary possession may be taken may not exceed 12 months (where land is/part of a dwelling) or 6 years for other land (s.21(2)); or
 - For leaseholder with right to occupy, stating that acquiring authority may not take temporary possession of the land

Lesser interference – temporary use of land?

- **Compensation – s.23 Neighbourhood Planning Act 2017**
- (2) A person (a “claimant”) who has an interest in or a right to occupy the land is entitled to receive compensation from the authority for any loss or injury the claimant sustains as a result.
- (3) A person (a “beneficial claimant”) is entitled to receive compensation from the authority for any loss or injury the beneficial claimant sustains as a result of the authority—
 - (a) interfering with a relevant right or interest annexed to land belonging to the beneficial claimant, or
 - (b) breaching a restriction as to the user of land arising by virtue of a contract where—
 - (i) the beneficial claimant is a party to the contract, or
 - (ii) the restriction benefits land which belongs to the beneficial claimant.
- (4) Where the claimant is carrying on a trade or business on the land, the compensation to which the claimant is entitled includes compensation for any loss which the claimant sustains by reason of the disturbance of the trade or business consequent upon the claimant having to quit the land for the period of the temporary possession.

Lesser interference – temporary use of land?

- Provisions of Neighbourhood Planning Act 2017 will apply to DCOs when brought into force;
- Model clauses will require modification
- Q:
 - How will this impact on consideration of whether power of compulsory acquisition is justified in respect of any particular parcel of land?
 - Impact on timely/economic delivery of the project – to what extent is this a legitimate consideration where promoter is a private undertaking rather than public body?

Lesser interference – rights

- ***R (oao Mars Jones) v Secretary of State for Business, Energy and Industrial Strategy*** [2017] EWHC 1111 (Admin)
 - North Wales Wind Farm Connection Order 2016 granted DC for 17.4km overhead electricity line. DC granted for period of 30 years, but Order authorised permanent extinguishment of private rights over order land.
 - Per Lewis J at [68]

“First, as a matter of principle, the inclusion of a power such as that contained in Article 23 of the Order is capable of being lawful. Section 120, and Schedule 5 to the 2008 Act, expressly contemplate that provisions of such a nature may be included within an order granting development consent. The fact that the power provides for the permanent extinction of private rights whereas the development consent itself will expire in 30 years does not of itself render the inclusion of Article 23 in the Order unlawful or necessarily disproportionate. It is possible to envisage situations in which the permanent extinguishment of a right, consequent upon the compulsory acquisition of another right (as in the example given above) is necessary.

Lesser interference – rights

“[69] Further, the terms of Articles 18 and 23 of the Order are carefully defined. The rights in Article 18 may only be created over Order land, that is land required for, or required to facilitate or which is incidental to, or is affected by the development. Article 23 of the Order may only be used over land which has been subject to the compulsory creation and acquisition of rights and where the continuance of the existing rights would be inconsistent with the exercise of the newly created and acquired right. Furthermore, if loss is suffered compensation is payable. The removal or extinction of the private law rights of a person is a serious and significant matter. In the present situation, however, the removal of rights is provided for by law and can only be done in narrow, defined circumstances, in the context of implementing a development which is in the public interest, and on payment of compensation if loss is suffered. As a matter of principle, therefore, the inclusion of the powers of extinguishment set out in Article 23 is capable of being lawful and within the powers conferred by the 2008 Act to make such an order.”

Lesser interference – rights

“[70] Secondly, it is clear on the evidence as a whole, that the panel did in fact consider whether the provisions contained in Article 23 should be included in the Order. It specifically asked written questions as to the purpose of the proposed Article 23 and for examples of its possible use. It also raised the issue of whether the development consent should be time limited and was considering the question of whether the power to acquire rights compulsorily should also be time limited. Given that the panel was considering the questions of the time limits on the development consent and the powers of compulsory acquisition, the inference, in my judgment, is that it was aware of the terms of Article 23 of the Order and it did consider whether or not to recommend the inclusion of powers of the nature provided for by Article 23 of the Order in perpetuity.”

Lesser interference – summary

- Applicant must have a clear idea of how they intend to use the land which is it proposed to acquire (DCLG Guidance para 9);
- When Neighbourhood Planning Act provisions in force:
 - Is it appropriate to include power to use temporarily any land which can be compulsorily acquired?
 - Can compulsory acquisition be justified if temporary use/possession a potential alternative?
 - Model clauses will require modification
- Extinguishment of rights – provisions need to be carefully defined, restricted and justified, and should be specifically considered during the examination (even where a general power)

Compensation & funding

Compensation – Planning Act 2008 s.126

- The order may not include provision the effect of which is to modify the application of a compensation provision, except to the extent necessary to apply the provision to the compulsory acquisition of land authorised by the order (s.126(2))
- The order may not include provision the effect of which is to exclude the application of a compensation provision (s.126(3))

Compensation & funding

Funding – DCLG Guidance

- *“Any application for a consent order authorising compulsory acquisition must be accompanied by a statement explaining how it will be funded. This statement should provide as much information as possible about the resource implications of both acquiring the land and implementing the project for which the land is required...”* (para 17)
- *“Applicants should be able to demonstrate that adequate funding is likely to be available to enable the compulsory acquisition within the statutory period following the order being made, and that the resource implications of a possible acquisition resulting from a blight notice have been taken account of.”* (para 18)

Compensation & funding

Potential issues:

- Significant dispute as to potential compensation payable for a site/s – what does this mean for applicant's evidence of available funding? (eg Manston Airport DCO inquiry)
- Temporary use/compulsory acquisition – how should this be factored in?

Costs

- Part D of DCLG's Guidance 'Award of costs: examinations of applications for development consent orders' (July 2013) makes specific provision for costs of an examination dealing with compulsory acquisition of land.
- Para 2 provides that where an objector has been successful in objecting to a compulsory acquisition request, an award of costs will "normally" be made in the objector's favour against the applicant.
- Conditions are set out in paras 3 and 4. Objector needs to have maintained their objection at all times before SS decision, participated in/been represented at the examination, and had their objection sustained by SS.
- Objection being "sustained" includes where SS makes DCO but does not include provisions authorising compulsory acquisition of whole or part of objector's property

Costs

- BUT – see ***R (oao Trago Mills Limited) v Secretary of State for Communities and Local Government*** [2016] EWHC 1792 (Admin)
 - Costs application in respect of land excluded from draft DCO by Council during the course of examination. Amended, and amended book of reference, accepted by ExA before examination concluded.
 - TM made application for costs after SS decision
 - ExA rejected application as out of time, and not prepared to exercise discretion to extend time
 - Hickinbottom J upheld ExA decision, and confirmed ‘trigger date’ for making costs application was date landed excluded from the compulsory acquisition request, not date of SS decision.

Thank you for listening

© Copyright Landmark Chambers 2019

With thanks to Alexander Shattock for his assistance in the preparation of this talk

London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham

4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us

 clerks@landmarkchambers.co.uk

 www.landmarkchambers.co.uk

Follow us

 [Landmark_LC](https://twitter.com/Landmark_LC)

 [Landmark Chambers](https://www.linkedin.com/company/landmark-chambers)