Compulsory Purchase Association

# CERTIFICATES OF APPROPRIATE ALTERNATIVE DEVELOPMENT

# COMPULSORY PURCHASE ASSOCIATION REFORM PAPER

## Background

It is now ten years since changes to the Certificate of Appropriate Alternative Development (CAAD) were introduced through the Localism Act 2011.

In early 2021 the CPA decided that CAADs should form the subject of their Annual Law Reform Lecture. This decision followed both the tenth anniversary of changes to the regime but also a series of recent cases in the Upper Tribunal (Lands Chamber) involving CAADs.

As part of the Annual Law Reform Lecture, Tim Mould QC prepared a paper with suggested reforms to the CAAD regime. Many of those suggested reforms were broadly accepted by panellists at the Law Reform Lecture held on 25 March 2021.

In Autumn 2021, the CPA convened a working group to consider the reforms put forward by Tim Mould QC and consider whether other aspects of the regime needed reform. That working group was made up of Charles Clarke (Chair, CPA), Tim Mould QC, Mike Kiely, Kirk Macdiarmid, Raj Gupta, Rob McIntosh, Liz Neate, Greg Dickson, Caroline Daly and Colin Cottage. This paper is the product of that working group's deliberations and the CPA is grateful for their work and input into the production of this paper.

The remit of the working group was not to consider situations where CAADs were no longer required if reform were made to section 14 Land Compensation Act 1961. The working group did feel that CAADs had a place in assisting the determination of development value within the existing valuation regime. Therefore, the working group assumed the continuation of the need for CAADs and changes to the procedures relating to it within that remit.

The background and current status of the law in relation to CAADs is well considered in the paper produced by Tim Mould QC for the CPA's 2021 Law Reform Lecture.

## Areas where reform is not required

The CPA considered a number of possible areas of reform, however the areas covered in the following sections of this paper were considered those that were appropriate for reform.

The procedures and rules governing appeals (save in relation to the determination of costs on appeal) are not covered in this paper. Currently appeals may be made to the Upper Tribunal (Lands Chamber) who will redetermine the CAAD. The working group considered the need for any change in this area. There is a current concern that some appeals are being made because one party is not happy with the contents of the CAAD when determined by the local planning authority because the quality of the CAAD is variable. However on the basis of the reforms proposed for the determination of CAADs at first instance then it was felt no reform was necessary. It is believed that sufficiently robust CAADs will be determined at first instance to prevent many CAADs being appealed to the Upper Tribunal (Lands Chamber) and that where appeals are made, the same basis for determination should remain. In addition, the parties on appeal should remain as they are, namely the acquiring authority and the affected party.



**Compulsory Purchase Association**
4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

**Determination of CAADs at first instance**

The current system places the determination of CAADs in the first instance with the local planning authority.

The working party considered concerns around this in relation to the following:

- Administrative burden on local planning authorities to determine CAADs.
- The lack of expertise within local planning authorities in applying the correct approach to the determination of CAADs where such applications infrequently come in and to objectively consider the policies as required by the test.
- The incentive for local planning authorities to determine CAADs that are a theoretical exercise with no practical result to their development management strategy.
- The conflict between the determination of a CAAD by a local planning authority where they are also the acquiring authority, and even if those conflicts are managed, the perception of the conflict and potentially the increased likelihood of an appeal as a result.

The working party also considered the proposal put forward by Tim Mould QC that the planning inspectorate take forward determination of CAADs in the first instance. It was noted that the Law Commission had previously recommended that the Planning Inspectorate could have a role in the determination of CAADs under a section 18 appeal in its 2003 "Towards a Compulsory Purchase Code" report. This proposal would give the Planning Inspectorate a role, but in the determination of applications under section 17.

It was considered that the proposal for the Planning Inspectorate to determinate CAADs in the first instance under section 17 and move that role away from local planning authorities has considerable advantages:

- It would create a centre of expertise in the determination of CAADs such that they became familiar to those determining them and a consistency in their determination.
- Determination of CAADs would be seen as independent of the acquiring authority, where the local planning authority and the acquiring authority were the same.
- A specific team dealing with CAADs would have the incentive to deal with applications in a timely way and be resourced to so that non-determination situations should not arise.
- Centralisation of these applications will allow for the standardisation of the application process (a point addressed later in this paper).
- Determination by an independent and experienced body would hopefully reduce the risk of appeals to the Upper Tribunal (Lands Chamber).

The main disadvantages are that a planning inspector would need to familiarise themselves with the local planning policy in making a determination on each occasion in a way a local planning officer would not need to do. In addition, the Planning Inspectorate would need to be resourced to deal with such applications.

The working party had the following further suggestions:

- The current fee for a CAAD application is minimal. It should remain the case that the fee for application for a CAAD should not be one that puts applicants off given the nature of the application in assisting in the determination of value for persons who have lost property through compulsory purchase. Whilst the reasonable costs for the determination of a CAAD are passed to the acquiring authority on most occasions, the affected party will need



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to pick up those costs in the first instance and is at risk on those costs if a negative certificate were to be the outcome.

- The process should be through written representations, thereby minimising costs in the first instance. Representations should be sought from the party not making the application (ie either the acquiring authority or the affected party). The local planning authority should also be afforded the opportunity to make representations. In general the issue of a CAAD is a theoretical exercise however there may be a concern that the determination of a CAAD would have an impact on their practical development management function, for example through the interpretation of a policy. It should also be noted that the local planning authority may also be the acquiring authority and care should be taken that any representations are not raising the same potential for conflict previously outlined.

**What is determined within a CAAD**

Currently, section 17(1) of the Land Compensation Act 1961 requires that a local planning authority determine appropriate alternative development through the provision of a certificate which is either positive (appropriate alternative development exists) or negative (no appropriate alternative development exists).

Where a certificate is positive the local planning authority must provide the certificate on the basis of "*that in the local planning authority's opinion there is development that, for the purposes of section 14, is appropriate alternative development in relation to the acquisition*". Section 17(5) then goes on to explain that the certificate "*must also identify every description of development (whether specified in the application or not) that in the local planning authority's opinion is, for the purposes of section 14, appropriate alternative development*".

The onus is therefore on the local authority to determine all forms of appropriate alternative development in issuing the certificate. Those forms of appropriate alternative development may not relate to the representations as to appropriate alternative development which have been applied for. This has two implications:

- It makes the process of issuing the certificate more complex for the local planning authority. It is not the case that the authority simply responds to what is applied for.
- It increases the risk of forms of appropriate alternative development not being included in the certificate issued. Whilst in many cases this may not have the effect of changing the valuation outcome, it can have implications for costs on appeal should the certificate be changed for a failure to include all forms of appropriate alternative development.

The working group considered that it would be better for the onus to be on the applicant to state the type and nature of appropriate alternative development that it is seeking in a certificate (or that it is applying for a negative certificate). This will allow resources to be concentrated on the types of development that will ultimately be relevant to the consideration of the valuation. For example:

- A party may apply for a negative certificate. This may either be granted or refused but in refusing to grant a negative certificate it will not be necessary for the determining authority to consider the type and nature of development which would be possible. It may be sufficient for the parties to negotiate a value for the land knowing that a negative certificate has been refused. However, it would also be possible for the other party to put in a counter application for a positive certificate and it is possible that both applications could be considered together.



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- A party may apply for a positive certificate in relation to a particular type or types of development (eg types of development in the alternative to a preferred type of development). It would be within the remit of the determining authority to determine the scope of the type(s) of development possible within the type(s) applied for, but other forms of appropriate alternative development not applied for would not be considered. The determining authority would then either grant the certificate for the type, or one or more of the types of development applied for or refuse the application if the type(s) of alternative appropriate development were not appropriate. In the latter situation the determining authority would not need to issue a CAAD for another type of development not applied for or issue a negative certificate.

The counter argument to the above is that the current system allows for an application to produce a categoric result. However, the working group felt on balance that the onus should be on the applicant to specify what is being applied for, and determination of that issue may of itself be sufficient to deal with the issue of valuation in question.

The above would require a legislative change to section 17(1) Land Compensation Act 1961.

**Standardising the information to be supplied**

The working group felt there would be merit in standardising the information supplied with a CAAD application. The current guidance from DLUHC on the compulsory purchase process provides some detail as to the suggested information that should be supplied with the application including suggesting that a Planning Statement should be supplied.

If responsibility for CAADs were handed to the Planning Inspectorate then this would present an opportunity to standardise the process and make provision of items such as a Planning Statement mandatory. This would also mean clarity for parties applying for a CAAD in the nature and scope of the documents that they need to provide. Even with the present guidance there are occasions where the detail of what needs to be supplied with a CAAD application is the subject of lengthy debate.

**Costs**

The working group considered the issue of costs and whether the present rules provided the correct balance.

There are two elements to be considered here:

- The rules of the Upper Tribunal (Lands Chamber) in relation to costs on an appeal.
- Whether section 17(10) provides the correct balance in who pays for the cost of a CAAD application and appeal.

The question of costs on appeal was raised in the case of *Leech Homes v Northumberland County Council*. The issue in that case related to the Tribunal's discretion to make a costs order in appeals under section 18 Land Compensation Act. The Court of Appeal determined that the current rules did not allow a costs order to be made because the Tribunal's discretion as to cost orders under Rule 10(6) of the Upper Tribunal (Lands Chamber) Rules did not cover appeals under section 18, despite the ability to award costs where the planning aspects are picked up as part of the general question as to compensation.

The working group felt that an amendment to Rule 10(6) should be made so that the Tribunal has the discretion to determine costs in the cases of an appeal relating to CAAD in the same way the



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Tribunal has discretion over compensation cases. Currently there is no way for a successful acquiring authority to recover its costs on a section 18 appeal even if the acquiring authority had been the applicant for the certificate and may have been wholly successful in the appeal proceedings. At present it means that an affected party can appeal to the Tribunal knowing that they will not need to pay the costs of the acquiring authority. This then leads to a situation where appeals may be made that might only have a low prospect of success and the appellant potentially still recover those costs under section 17(10) in addition as an expense reasonably incurred.

Having determined that an appropriate amendment to Rule 10(6) should be made, the working group considered whether changes to section 17(10) Land Compensation Act 1961 should be made. This section covers the recovery of costs relating to a CAAD application and appeal by an affected party. The section currently states:

"*In assessing any compensation payable to any person in respect of any compulsory acquisition, there must be taken into account any expenses reasonably incurred by the person in connection with the issue of a certificate under [section 17] (including expenses incurred in connection with an appeal under section 18 where any of the issues are determined in that person's favour).*"

On balance the working group felt that no change to the emphasis or balance of this provision should be made. This is an established position that is then worked through in the assessment of the overall compensation. However, it was acknowledged that there are counter-arguments to this position including:

- The general position in seeking planning permission is that a landowner pays their own costs.
- Where the acquiring authority's offer before a CAAD application were made exceeds that of a Tribunal determination following a CAAD, the authority should not need to pay costs associated with a CAAD application because the CAAD application would have been avoided, had the offer been accepted.

Whilst acknowledging those arguments the working group determined, on balance, no change should be made to section 17(10) in that respect.

However, the working group identified a potential issue that a change to Rule 10(6) of the Upper Tribunal (Lands Chamber) Rules may not have full effect unless a consequential change to section 17(10) was made. Under section 17(10) a person's expenses may be recovered, including under section 18, where any of the issues are determined in that person's favour. This could present a situation where:

- A small issue on a CAAD appeal is determined in favour of an affected party (for example an additional appropriate alternative development heading) but the main issue on appeal that affected valuation is determined in favour of the acquiring authority.
- Section 17(10) would then have effect allowing the affected party to recover their expenses on appeal.
- However, the Tribunal may make a costs order in that instance, possibly against the affected party. Could the affected party then nevertheless recover their appeal costs and costs ordered against them under section 17(10)?

The CPA notes that the Tribunal Procedure Committee have launched a consultation on a change to Rule 10(6) and a full response in relation to this will be provided by the CPA through a response to that consultation.



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**Date a CAAD falls to be assessed**

The case of *Lockwood v Highway England Co Ltd* highlighted an issue in section 14 Land Compensation Act 1961 about the date on which appropriate alternative development is deemed to be determined where the application for a CAAD falls before the "relevant valuation date" under section 14(4). This sometimes arises where an application for a CAAD is made in cases of blight where a blight notice had been accepted.

The working group therefore felt two changes were necessary to the legislation to deal with this issue:

1. A subsection should be inserted into section 17 that the date on which appropriate alternative development is considered for the purposes of a CAAD is:
    - The relevant valuation date if the determination of the CAAD is after that date.
    - At the date of determination of the CAAD if earlier.
2. Section 14 should, in the alternative to the relevant valuation date, have the date specified in section 154(3) of the Town and Country Planning Act 1990 if earlier than the relevant valuation date.

This would also mean that a CAAD applied for in the shadow of compulsory purchase before the relevant valuation date (for example in order to aid a valuation for an early acquisition) would also have to use the date of determination of the CAAD for the policies that apply. However, the working group felt that there was no other basis on which a CAAD could be determined, where it is determined before the relevant valuation date. If the parties did not agree a valuation at that point, and the acquisition then occurred after the relevant valuation date, then possibly a new CAAD may need to be applied for if the parties felt that the planning position on the relevant valuation date may have been different to that on the determination of the earlier CAAD. In practice the working group feel this would rarely occur.

**Principle of equivalence where there are multiple CAADs**

The case of *Secretary of State for Transport v Curzon Park Ltd and others* has raised questions over the principle of equivalence where multiple CAADs in close vicinity are applied for and where, if planning applications for the developments were before the local planning authority in the real world, consideration of the cumulative effects of the various applications would be required in a way that they are not for CAADs. The effect may be to create valuations of individual sites which would be in excess of the valuations in the real world had the cumulative effect of neighbouring developments been considered.

The matter was last before the Court of Appeal and that decision is the subject of an outstanding application for permission to appeal to the Supreme Court at the time of writing.

The working group felt it was too early to draw conclusions as to whether the principle of equivalence will in fact be breached, even under the Court of Appeal judgment, once the valuations are finally determined.

If the outcome of these cases were considered to result in a breach of the principle of equivalence (which the working group considered needed to be established in practice), it might be possible to amend the legislation to include further consideration of possible development outside the acquired land in determining appropriate alternative development in an attempt to rebalance any breach of the principle of equivalence that could arise from multiple CAADs in close vicinity. There could be



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achieved in several ways. However, the working group considered that, whatever process was put in place to try to achieve that, it would add complexity in the determination of CAADs and additional uncertainty. This could lead additional areas of contention between parties and to delays in settlement and additional litigation. Therefore, the working group concluded that amending the legislation in this area to address any apparent breach of the principle of equivalence could create more issues than it solves.

Accordingly, the working group did not put forward any specific proposal for amendment to the legislation in this area.

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