Land Value Capture

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1. Introduction

1.1 Land value capture has no technical or legal meaning. For present purposes it can be described as:

> *Mechanisms for transferring from landowners to public authorities or others the wealth created by the development of their land or of other land*

1.2 Land value capture is also not an end in itself. Whether it is a means to an end we will come to in due course. Treating land value capture as an end in itself – as an objective to be achieved – is to see the taking of property by the state as the purpose of the exercise. That may appeal to some, it not about promoting development.

1.3 If it is to be means, then a means to what end?

1.4 The House of Commons Select Committee on Housing, Communities and Local Government established an inquiry in 2017 which 'examines the effectiveness of current land value capture methods and the need for new ways of capturing any uplift in the value of land associated with the granting of planning permission or nearby infrastructure improvements and other factors.'

1.5 Put like that, the terms of reference proceed on the basis that land value capture is good and the only question is whether it should be done more effectively. It is essential though to start with asking what might be the reasons for land value capture and whether and why it should be used. That then leads on to the mechanisms available in the field and the extent to which they can be changed successfully.

2. Why have land value capture?

2.1 The rationales for land value capture can fall under the following headings:

- Meeting the external costs of development
- Recovering betterment due to public spending on infrastructure
- Recovering betterment due to a policy change or planning approval
- Transferring value to public authorities
- Reducing house prices

External Costs

2.2 The first – and best – justification for land value capture is to fund the construction of public infrastructure and facilities which are needed to address the impacts of the development. Otherwise the public sector will have to pick up the consequences and may therefore find itself having to subsidise private investment.

2.3 Lord Hoffmann in *Tesco Stores v Secretary of State for the Environment* used the expression 'external costs' to cover:[1]

> "consequences involving loss or expenditure by other persons or the community at large. Obvious examples are the factory causing pollution, the office building causing parking problems, the fast food restaurant causing litter in the streets."

2.4 The most straightforward examples concern new facilities which are only required because of the project. Vehicles from a new employment site may cause congestion if existing road junctions are not upgraded. To avoid that congestion or the highway authority having to pay, it is reasonable for the development to fund any necessary improvements.

2.5 Moving beyond the examples given by Lord Hoffmann, bringing a population to an area has its own social consequences. The inhabitants of a housing estate will need schools, healthcare, leisure facilities, open space, suitable means of transport and libraries. In one sense of course a person's need for those services arises not because a house has been built but because that person exists. The point though is that the services are needed in that particular location because of the development. Any child will need schooling but the need for a new or expanded school at that location may arise just because children live in a new development.

2.6 Whilst the original landowners, developers and those who live in or occupy new buildings will contribute to general taxation, including in the former cases because of the profits from the development, a local demand may put unplanned capital expenditure on public authorities. The occupants of a housing estate will fund schools through the taxes they pay, but will not have specifically provided for the cost of a new primary school to serve the estate.

Betterment

2.7 The actions of government may affect property prices. Those actions will range from the general to the local. General effects may arise from the government's responsibility for the state of the economy and (now indirectly, for interest rates) and from national measures aimed at the property market, such as property taxation, assistance to buyers and renters

[1] [1995] 1 W.L.R. 759 at 771. More recently Lord Hodge JSC has given the examples of 'educational facilities, healthcare facilities, sewerage or waste and recycling: requiring a development to contribute to, or meet, its own external costs': *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Co Ltd* [2017] UKSC 66; [2017] P.T.S.R. 1413 at para 41.

and the government's own purchasing. National planning policy and permitted development rights may alter the values of some sites.

2.8 There are also local measures. The arrival or closure of a major employer could affect demand and the money available for other property. Major infrastructure improvements could make a location more attractive for commercial and residential occupiers. In some cases public works may have a direct effect on particular land: for example by providing a road or services up to it or providing flood defences. Public authorities might recover a charge based on an increase in land value or an apportionment of the costs of the works.

2.9 The second potential aspect of betterment is that arising from planning designations and decisions. Planning policy might promote the development of a site, or resist it. Similarly the grant of planning permission is necessary for most sizeable operations and changes of use. Land values may increase substantially if permission is granted. In principle, any benefit is not however due to expenditure by the state but to a lifting of control. Who has the first claim on the benefit depends upon political philosophy: whether people should be able to develop unless there is a public interest reason not to; or whether the right to develop was nationalised in 1947 and so is 'owed' by the state, even if the land is not. Infrastructure provision might be essential to a project, but that is a separate aspect.

Transferring value to public authorities

2.10 Land value capture can simply be a means of taxation: levying a charge on an economic activity to generate funds which can be spent by public authorities for the public good. Such taxes may be for general expenditure at a national or local level or earmarked for a specific purpose. The taxes will not necessarily be related to costs or benefits associated with the development of the land and may simply reflect any profits or transactions.

2.11 It might also be unrelated to the costs of providing infrastructure for the taxed development. Some proponents of land value capture by taxation see spending the revenue in the area of the development as regressive, since it leads to more resources to wealthy areas which can afford the taxes.[2]

Reducing house prices

2.12 Depressing the price of development land could be seen as a way of reducing the price of homes and other land which has been developed. However that relies not so much on capturing development value as destroying it: reducing the return to the landowner but ensuring that this decrease is available to the ultimate purchaser rather than paid to a public authority or adding to the developer's profits. New build contributes only a minority of housing sales limiting its influence on overall house prices.

[2] See *The Raynsford Review of Planning Provocation Paper 3: Do we need a betterment tax?*

3. Mechanisms

3.1 Various mechanisms have been used to obtain funds or benefits from landowners or occupiers in connection with development. Whilst addressed in the context of land value capture, many of these are not set by reference to land value.

Planning obligations and agreements

3.2 Persons interested in land may enter into a planning obligation or agreement[3] requiring them to do or refrain from doing various matters on site or to make payments to the local planning authority for off-site activity. Planning obligations are usually made in connection with the grant of planning permission. They will commonly be used to provide for the provision of open space and affordable housing on the application site, pave the way for the transfer of land for school and other purposes and pay the local authority for off-site works or activities, such as highway improvements, affordable housing or improved library facilities.

3.3 A planning obligation can only be sought in relation to a planning application if it is *directly related to, and fairly and reasonably related in scale and kind to, the development.*[4] *In addition, as a matter of policy, government has considered that obligations should be necessary to enable a proposed* development to be acceptable before they can be taken into account. That long-standing policy requirement is now introduced into law in England and Wales.[5]

3.4 Affordable housing sits in a different position to other external costs. Building market housing does not create a need for affordable housing, unlike say a requirement for road improvements or schools. However planning considers it to be unacceptable in social terms to have monolithic estates with a single type of housing and in practice affordable housing is reliant in large part on private developments coming forward.

3.5 Whether a planning obligation is necessary and so can be sought is not affected by the land values of the project or its overall viability. Viability becomes relevant as a means of reducing the scale of any planning obligations on the basis that the scheme cannot afford what would otherwise be required of it. Of course, the planning authority could decide that the development ought not to proceed without that contribution, but frequently reductions are made. One factor in a viability assessment is the value of the land which is put into the scheme, a matter that is considered further below.

Community Infrastructure Levy

3.6 Community Infrastructure Levy (CIL) is a charge on the carrying out of certain development for the purpose of supporting development by funding the provision, improvement, replacement, operation or maintenance of infrastructure[6]. Up to 25% of the CIL receipts may be spent by town and parish councils (or in their absence, the local authority) infrastructure or anything else that is concerned with addressing the demands that development places on

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[3] In England and Wales these are planning obligations made under section 106 of the Town and Country Planning Act 1990; Scotland has planning obligations under section 75 of the Town and Country Planning Act 1997; and in Northern Ireland planning agreements are made under the Planning Act (Northern Ireland) 2011, section 76. The only practical difference is that an obligation may be made unilaterally or by agreement whilst a planning agreement requires the consent of the local planning authority. In this paper obligations and agreements are used interchangeably. For the use of planning obligations see *Planning Permission*, Richard Harwood, Bloomsbury Professional (2016), chapter 12.

[4] *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Co Ltd* [2017] UKSC 66; [2017] P.T.S.R. 1413.

[5] Community Infrastructure Levy Regulations 2010, regulation 122.

[6] See Planning Act 2008, section 216(1).

an area.[7] CIL is levied by the local planning authority and in addition the Mayor of London[8] who has levied a charge to contribute to Crossrail. CIL may not be charged before the authority has adopted a charging schedule setting out the rates or other criteria to be applied[9]. CIL rates are set having regard to the actual and expected costs of infrastructure to support the development of its area, the desirability of funding this from CIL, the economic viability of development across its area, other actual and expected sources of funding for infrastructure and the administrative costs of CIL.[10] The effect of exemptions and exceptions to liability for CIL must also be taken into account both in how much is raised and also in the rates levied on paying development. These exemptions include social housing but are otherwise confined to single unit schemes or alterations and a discretionary exception circumstances relief.[11]

3.7 Different rates may be set for different zones, intended uses, intended gross internal areas or the number of dwelling or units proposed[12]. This may include a different rate per square metre for developments over a certain size (such as larger rates for superstores than for smaller retail units) and nil rates can be set for particular types of development or zones. A development project may be subject to both CIL and a planning obligation, although a particular scheme should not have to fund the same piece of infrastructure through both routes.[13]

Charges for particular improvements

3.8 In some circumstances, land which benefits from particular infrastructure works can be required to contribute to their cost. This concept has an ancient heritage. An Act of 1427 (in the reign of Henry VI) authorised Commissioners of Sewers to require those who benefited from sea defence works to pay for them.[14] It has been carried on at various times to the provision of sewers, land drainage and the making up of private streets.[15]

General taxation

3.9 Land value capture is carried out by general taxation, both at the national and local level. An increase in the value of land is a chargeable gain on disposal and is subject to capital gains tax (for individuals[16]) and corporation tax (for companies). Capital gains tax is levied at rates between 10 and 28% whilst the main rate of corporation tax is 19%.

3.10 Property transactions are also subject to Stamp Duty Land Tax in England and Northern Ireland, Land Transaction Tax in Wales and Land and Buildings Transaction Tax in Scotland. SDLT rates are up to 5% for non-residential or mixed use properties and up to 12% for residential properties and are payable by the buyer.

3.11 Those who carry out the development will be subject to corporation tax, capital gains tax or income tax.

3.12 The occupiers of property are subject to council tax or business rates. Business rates are based on the rental value of property, revalued every five years. The standard rate is 49.3 pence in the pound, so 49.3% of the annual rent which could be obtained for the property.

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[7] Community Infrastructure Levy Regulations 2010, regulation 59C

[8] Planning Act 2008, section 206(2),(3)(a).

[9] Planning Act 2008, section 211(1).

[10] Planning Act 2008, section 211(2), Community Infrastructure Levy Regulations 2010, regulation 14.

[11] CIL Regulations, regulations 42 to 57.

[12] CIL Regulations, regulation 13(1).

[13] See CIL Regulations, regulation 123.

[14] See Uthwatt Committee, para 263.

[15] For private streets see Highways Act 1980, s 205(1).

[16] High value homes owned by overseas companies are also subject to capital gains tax.

Council tax is paid (essentially) by residential occupiers based on the value of the property at a locally set rate levied against price bands. Since a revaluation has not taken place, any local market changes since 1991 will not be reflected in the band in which the property sits, although alterations to the property itself might have led to a rebanding.

3.13 Business rates do reflect actual use rather than potential and the sensitivity of Council Tax is limited by the absence of a revaluation since 1991. Subject to those caveats, increases in property value due to the grant or potential for the grant of planning permission or the carrying out of development on the site or public works offsite are caught in various ways by these taxes.

3.14 The rate which is applied to the increased property value is not adjusted for the scheme, so there is no localised increase in the tariff to pay for the project which particularly benefits the premises. Supplements to business rates are possible in business improvement districts, where there is the support of the majority of business ratepayers by number and value.[17] The Business Rate Supplements Act 2009 allows an authority to impose a levy on non-domestic ratepayers to raise money for a project which will promote economic development in its area.[18] Such a levy is subject to a ballot of those ratepayers.[19] The levy might be set to apply only above a particular rateable value but applies across the levying authority's area. It is being used as one of the mechanisms for funding Crossrail.

[17] Local Government Act 2003.

[18] Business Rate Supplements Act 2009, section 1. The funds may not be used for housing, social services, education, children's services, health and planning services: section 3(3).

[19] Business Rate Supplements Act 2009, section 4.

4. The Compensation code

4.1 A number of recent contributions to the Land Value Capture debate have suggested changes to the basis of compensation for the compulsory acquisition of land. This, it is said, would enable public authorities to acquire land compulsorily or under the threat of using compulsory powers more cheaply, freeing up values for infrastructure. Some have contended that reducing compensation in compulsory purchase cases would also reduce land costs in private transactions by the same amount. Before turning to those proposals, it is useful to consider the current compensation rules and some of their history.

4.2 The basic principle in compulsory purchase compensation is that of equivalence: that the dispossessed owner or occupier should be put in the financial position that they would have been in if it was not for the compulsory acquisition.

4.3 Compensation for land acquired falls under three main heads:

- The market value of the land
- Loss payments
- Disturbance (essentially loss of profit and expenses)

Market value of the land

4.4 The Land Compensation Act 1961 section 5 rule 2 is to the effect that compensation is paid on what the land would have sold for in the open market.[20] This value may derive from the existing use and condition of the land, referred to as existing use value (or EUV). Value may also derive from the price that the market would put on the potential for further development to take place, often referred to as hope value. Hope value may derive from a scheme which has planning permission or where there would be a prospect of planning permission (if it was not for the proposed compulsory acquisition). The chance of receiving planning permission would be reflected in the value: the greater the likelihood of permission being granted, the higher the price.

4.5 The prospect of the scheme may affect how the planning process deals with the site. Most obviously planning permission would be granted for the scheme. Permission may in practice be refused for other projects because of the impending compulsory purchase[21] or it may seem futile to submit an application given the likely acquisition of the site. A landowner may therefore be disadvantaged because they have not been able to obtain planning permissions which would have reflected the land's potential in the absence of compulsory purchase. A number of assumptions are therefore made as to what would have happened[22] and a certificate of appropriate alternative development may be sought from the local planning authority to set out what permissions would have been granted. For valuations, it is assumed that planning permission would be granted for the development in the certificate.

4.6 However in all of these cases, the value would be how the market would price the land with such a consent or potential for consent.

4.7 All valuations omit the effect of the scheme for which the authority acquires the land, or the prospect of that scheme.[23] 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

[20] An exception is that if the land is in a use which does not have a market value, such as a church, then compensation is paid for the cost of establishing another building for that use (equivalent reinstatement): section 5 rule 5.

[21] Planning policies may safeguard land for particular schemes or transport routes.

[22] Land Compensation Act 1961, section 14.

[23] Land Compensation Act 1961, section 6A.

the exercise of a statutory function or by the exercise of compulsory purchase powers.[24] Schemes which are specifically disregarded include new towns, urban development areas and mayoral development areas.[25] Additionally where land is acquired for regeneration or redevelopment which is facilitated or made possible by a relevant transport project then valuation takes place assuming that the transport project does not happen.[26]

4.8 An example of how this works was given by Lord Denning. Take a scheme involving a new motorway with service stations and the land acquired is for one of the service stations. Whilst the valuation will (usually) proceed on the basis that there is planning permission for a service station on the land, it will also assume there is no scheme for a motorway and service stations. If there would be no demand for a service station without the motorway, then there would be little if any increase in value.[27]

4.9 This does not prevent hope value arising, even for a similar project, but it will be that price that could have been achieved in the market without the public authority intervention.

4.10 The approach of paying compensation based on market value and expenses with some exclusion for the scheme is commonplace in other European countries. In Germany 'the basic idea of compensation in the case of a compulsory taking of private land is that the expropriated owner shall be able to buy a new plot of the same quality and characteristics as the expropriated land'.[28]

4.11 The quality of the land is affected by the planning designation prior to expropriation. This may include the development potential of the site,[29] but like the UK 'no scheme world' does not value on the public purpose of the acquisition. In the Netherlands when land is acquired by public authorities for development at close to agricultural values, this is because it is assigned for purchase before value is added through planning designation. The Dutch Expropriation Act provides for the payment of full compensation for all damages directly or necessarily suffered as a result of the loss of property.[30]

4.12 Set off against the compensation would be any betterment of the claimant's land which is not acquired.[31] The common example is the taking of part of a person's land for a new road which would make the remainder of his land accessible for development.

4.13 In practice, the compensation which is paid out usually reflects existing use values. Hope value is harder to recover because it needs to be shown what permission is likely to have been granted and how that prospect would have been priced. Whilst discouraged by the Lands Chamber,[32] this has often involved preparing an alternative scheme and carrying out a residual development appraisal. A development appraisal takes the value of the scheme if it was built and takes away the costs of building it, including professional fees, sale and purchase costs (including SDLT), financing costs and the profit that the developer would need to carry it out.[33]

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[24] Land Compensation Act 1961, section 6A(6) rule 3.
[25] Land Compensation Act 1961, section 6D(2).
[26] Land Compensation Act 1961, section 6D(3)
[27] *Myers v Milton Keynes Development Corporation* [1974] 1 W.L.R. 696 at 704.
[28] Winrich Voss, *Compulsory Purchase in Poland, Norway and Germany*, XXIV FIG International Congress 2010.
[29] Winrich Voss, *Compulsory Purchase in Poland, Norway and Germany*.
[30] Compulsory Purchase Association written evidence to the Select Committee.
[31] Land Compensation Act 1961, section 6B.
[32] *Ridgeland Properties Limited v Bristol City Council* [2009] UKUT 102 (LC) at 293.
[33] A developer profit will have to pay for the developer's own headquarters costs and so on, so it is not a straight profit to the developer's shareholders.

Loss payments

4.14 Loss payments are also made, shared between the owner and occupier at a combined total of 10% of the value of the land.[34] Payments are though limited to various maximum levels, the highest being £100,000 for each claimant. They will therefore be a more significant factor in the overall acquisition costs where small plots are acquired, such as existing housing areas.

Disturbance

4.15 Disturbance is compensation for losses caused by the compulsory acquisition which are not otherwise part of the value of the land. These will include the costs of selling the land, including professional and legal fees and losses reflecting the time spent on the compulsory acquisition process and negotiating compensation. Relocation costs are also included, such as professional fees, stamp duty land tax, removal expenses and redirecting the mail. Where a business is dispossessed then it will also recover its value and close-down costs if the business is to be extinguished (in whole or in part) or any loss of profit due to the move. These losses may include the disruption caused by relocating, ending up in a less favourable location or building, or the cost of special adaptions to the new premises. So where the land is taken from a business occupier would otherwise be able to stay on the site for a long time[35] then the disturbance compensation may be very substantial.

4.16 Where land is valued on its development potential then disturbance compensation is likely to be more limited since realising this potential involves disrupting or removing the current use. For example, if an industrial site is acquired for housing then compensation is unlikely to be paid for both the potential residential value and losses caused by extinguishing or relocating the industrial business.

Effect of the compensation code

4.17 The effect of the compensation code is that even when land is valued on the basis of its existing use rather than any development potential then the compensation paid is more than the existing use value, sometimes very considerably more. The regime recognises that there are costs and losses involved in selling and moving somewhere else. All of those losses should be recovered and there is a small loss payment for the fact of the acquisition being compulsory.

4.18 It is though worth having in mind that the compensation code values land on the basis of a willing seller. To that extent a compensation code with hope value may reasonably reflect the price at which a landowner will be persuaded to sell. No landowner would willingly sell at an inconvenient time without the benefit of hope value.

[34] Land Compensation Act 1973, sections 29 to 33K.

[35] Such as a freehold, reasonably long leaseholder (say 10 years or more to run) or security of tenure under the Landlord and Tenant Act 1954, Part II. Businesses with very short term occupancy rights tend to receive very little in disturbance compensation because they could have been required to leave the site in the near future in any event.

5. Planning and compensation – a brief history

5.1 The Housing, Town Planning Act 1909 allowed planning schemes to be made for 'any land which is in course of development or appears likely to be used for building purposes, with the general object of securing proper sanitary conditions, amenity, and convenience in connexion with the laying out and use of the land, and of any neighbouring lands'.[36] Compensation was available for the injurious affection of any property by the scheme[37] and a 50% betterment levy for any increase in value due to a scheme.[38] The likelihood of betterment arising was limited as the schemes controlled rather than authorised or generally prohibited development. Betterment was only paid on three occasions under the 1909 Act and the consolidating Town Planning Act 1925.[39]

5.2 As an aside, there is a tendency in the current land value capture debate to quote Winston Churchill's support of land tax in the 1909 'People's Budget'.[40] The principal land measure in the Budget was a 20% tax on increases in the value of land levied on sale, long lease, death or, every 15 years in the case of land owned by bodies.[41] There was also an annual levy on undeveloped land, at 0.417% of the value of the land which exceeded agricultural value.[42] The 20% tax was a national levy, not related to particular infrastructure or planning policy, which was similar to the current capital gains or corporation taxes for taxing capital profits. His 21st Century admirers are seeking different solutions.

5.3 From the Acquisition of Land Act 1919 the valuation of land in compulsory purchase was to take the open market value,[43] including the value of any potential to develop. Prior to 1932 there were few requirements for consent before building could take place so the development potential relied on what the market could bear given the local context.

5.4 The Town and Country Planning Act 1932 began to introduce widespread planning control with local authorities being able to prepare planning schemes 'with the general object of controlling the development of the land comprised in the area to which the scheme applies, of proper sanitary conditions, amenity and convenience, and of preserving existing buildings or other objects of architectural, historic or artistic interest and places of natural interest or beauty, and generally of protecting existing amenities whether in urban or rural portions of the area.'[44] Such schemes could restrict the ability to develop and require consents to be obtained. Compensation was payable for injurious affection caused by such schemes[45] but could be severely limited in the schemes themselves to broadly the loss of any rights to replace or alter existing buildings.[46]

5.5 The introduction of planning control meant that market value then began to reflect the potential for planning consent being granted as well as what a developer or potential occupier would be willing to pay.

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[36] Housing, Town Planning 1909, section 54(1). It also introduced planning agreements: schedule 4, para 13.
[37] Housing, Town Planning 1909, section 58(1). Compensation for the compulsory acquisition of land has a much longer history, including major reforms in 1845.
[38] Housing, Town Planning 1909, section 58(3).
[39] Uthwatt Report, para 292.
[40] See *Bridging the infrastructure gap*, Thomas Aubrey (Centre for Progressive Capitalism), p 14; Home Front, Martina Lees (Sunday Times, 4th April 2018).
[41] Finance Act 1910, sections 2 to 6.
[42] Finance Act 1910, sections 16 to 19. One halfpenny for every 20 shillings.
[43] Acquisition of Land Act 1919, section 2. This replaced the notion of the value of the land to the owner in the Land Clauses Compensation Act 1845, which might be higher.
[44] Town and Country Planning Act 1932, section 1.
[45] Town and Country Planning Act 1932, section 18.
[46] Town and Country Planning Act 1932, section 19.

5.6 The 1932 Act did also include a local betterment element. Where the value of any land was increased by the coming into operation of a planning scheme or the execution by a responsible authority of any work under a scheme then the authority could claim 75% of the increase. However any claim had to be withdrawn if the owner requested a deferral and had not obtained that some or more in compensation for the scheme.[47] A fresh claim could be made by the authority if there was a subsequent disposal or change of use of the property (or after five years in the case of business and industrial premises) but subject to the same potential for deferral.[48] In practice therefore betterment only worked to offset compensation claims under the Act.[49]

5.7 The Town and Country Planning (Interim Development) Act 1943 introduced a nationwide requirement for consent before carrying out development. Where schemes had not already been prepared nor a resolution made to prepare a scheme then a resolution was deemed to be in force.[50] Authorities were then able to enforce against any development carried out which was not in accordance with an interim development order or approved application.[51]

5.8 A comprehensive system of control was put in place by the Town and Country Planning Act 1947. The 1947 Act contained three principal, and heavily related, financial provisions:

- A development charge, levied on the increase in the value of land due to the grant of planning permission.[52] This was set at 100% of the uplift;
- Compensation for the removal of rights to develop, but limited to a national fund of £300 million;[53]
- Restricting land value for compulsory purchase purposes to existing use value.[54]

5.9 These provisions all assumed that planning permission would be granted for any class of development in the Third Schedule to the Act.[55] These classes provided for the replacement or modest enlargement of buildings which were existing (or had existed in the previous 10 years) and certain limited changes of use.[56] The compensation fund solely addressed losses due to restrictions imposed by the 1947 Act, not those caused by the earlier 1932 or 1943 legislation.[57] The overall effect was that full compensation was not paid for the removal of the right to develop.

5.10 The development charge had acted as a break on sites coming forward. It was abolished and payment of the £300 million fund suspended by the Town and Country Planning Act 1953. The Town and Country Planning Act 1954 added to the compensation payable for compulsory purchase any development value which had been removed by the 1947 Act and which had not yet been compensated for under the fund.

5.11 Abolishing the development charge restored the landowners' incentive to develop. It also led to what was referred to as 'the two-price system, one price for private sales and another

[47] Town and Country Planning Act 1932, section 21.
[48] Town and Country Planning Act 1932, section 21(2).
[49] By 1942 there had been no cash payments of betterment under the 1932 Act and only a few occasions when it was used to counter a claim for compensation: Uthwatt Report, para 292.
[50] Town and Country Planning (Interim Development) Act 1943, section 1.
[51] Town and Country Planning (Interim Development) Act 1943, section 5(1).
[52] Town and Country Planning Act 1947, section 69.
[53] Town and Country Planning Act 1947, section 58.
[54] Town and Country Planning Act 1947, sections 51(2),(4), 55.
[55] Town and Country Planning Act 1947, sections 51(2), 61(2)(a), 69(2).
[56] Town and Country Planning Act 1947, Third Schedule.
[57] Town and Country Planning Act 1947, section 61(2)(b).

for public purchases'.[58] Sales to public authorities under the threat of compulsory purchase were conducted on a compensation code basis, close to existing use values, whilst sales in the private market took into account the development potential of the land. By 1958 it was common ground that this had happened. The Labour opposition did not oppose the reversion to market value: its principal point was to say that it had warned that a two-price system would come about.[59]

5.12 A further difficulty with the reduced compensation was that it encouraged landowners to object to compulsory purchase. The Franks Committee considered that there would be 'far fewer' objections if compensation was based on market value.[60]

New Towns

5.13 The post-War new towns programme has sometimes been upheld as a success of the 1947 Act's restriction of compensation to existing use value. The Select Committee's notice of its inquiry said:

> "The recent history of the building of the post-war new towns provide a lesson here. These new towns would never have been built without buying land at existing use value."

5.14 Simply as a matter of chronology, that is not correct. The first ten new towns were designated between 1946 and 1950, so were able to take advantage of the restricted compensation regime between 1947 and 1958.[61] However the next wave of five were designated between 1961 and 1964. The final six towns, including Milton Keynes, were only designated between 1967 and 1970.[62] So half of the new towns were built without being able to exclude hope value.

5.15 Land acquisitions for new towns from 1958 were judged in the 'no scheme world', excluding the effect of the new town designation. So even whilst the compensation assessment would take into account existing or proposed planning permission for the new town, the valuation would be on the basis that the scheme was not taking place. In *Myers v Milton Development Corporation* some 323 acres were acquired with a view to planning permission being granted in 10 years' time. Lord Denning said the question was, on the day the land was taken:[63]

> "… what price would a willing seller be prepared to accept, and a willing purchaser to pay, for the Walton Manor Estate, if there had been no proposal for a new town at Milton Keynes; and if the prospects of development on and in the neighbourhood of the Walton Manor Estate had then been such as they would have been if there had been no proposals for a new town: but with this one additional circumstance, that the purchaser had an assurance that in March 1980 or thereafter, if he applied for planning permission to develop the Walton Park Estate or any part of it for residential purposes — in a manner not inconsistent with the development corporation's proposals — he would be granted it."

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[58] See the Second Reading Debate on the Town and Country Planning Bill 1958, HC Deb 13 November 1958 vol 595 at col 585 (Mr J.R. Bevins, Parliamentary Secretary).

[59] HC Deb 13 November 1958 vol 595 at col 595 to 601 (Mr G. R. Mitchison).

[60] Franks Report on Administrative Tribunals and Enquiries, 1957, at para 278.

[61] Stevenage, Crawley, Hemel Hempstead, Harlow, Newton Aycliffe, Peterlee, Welwyn Garden City and Hatfield, Basildon, Bracknell and Corby were designated between 1946 and 1950.

[62] Skelmersdale, Telford, Redditch, Runcorn and Washington were in the second wave with Milton Keynes, Peterborough, Northampton, Warrington, Telford and Central Lancashire the final towns to be designated.

[63] [1974] 1 W.L.R. 696 at 705. Other new towns cases include *Viscount Camrose v Basingstoke Corp* [1966] 1 W.L.R. 1100, *Kaye v Basingstoke Corporation* (1969) 20 P. & C.R. 417, *Domestic Hire v Basildon Development Corporation* (1970) 21 P. & C.R. 299.

Later levies, charges and obligations

5.16 The Land Commission Act 1967 introduced a betterment levy, set at initially 40% but intended to increase, arising on the sale, leasing or the start of 'material development' of land. In conjunction with purchases by the Land Commission, which served to raise demand overall, and the prospect of the repeal of the levy, 'the consequence was an acute land shortage and high prices'.[64] The betterment levy and the Land Commission were both abolished with effect from July 1970.[65]

5.17 The Community Land Act 1975 contained an assumption into compensation valuation that planning permission would not be granted except for very limited categories of development and land owned by charities.[66] However that provision was never brought into force and was repealed in 1980.[67] Making it into operation as part of the same suite of measures was the development land tax, levied initially at 80% (with a view to further increases to 100%) although with large allowances. The tax was reduced to 60% by the incoming Conservative government and then later abolished.

5.18 The system of planning agreements was revised by the Planning and Compensation Act 1991 to allow what were now called planning obligations to be made without the agreement of the local planning authority (a useful mechanism on appeal) and with more formal mechanisms for variations.

5.19 Several attempts at further change were made and abandoned in the 2000s. The Planning and Compulsory Purchase Act 2004 proposed planning contributions (the detail of which was left to secondary legislation) but no regulations were ever made.[68] The Planning-gain Supplement (Preparations) Act 2007 was concerned with 'preparing for the imposition of a tax on the increase in the value of land resulting from the grant of permission for development'[69] but that again was not pursued.

5.20 After all of that legislative woe, the Community Infrastructure Levy was brought in by the Planning Act 2008 and the Community Infrastructure Levy Regulations 2010.

[64] *Urban Planning Law,* Malcolm Grant, Sweet & Maxwell (1982), p. 26.
[65] Land Commission (Dissolution) Act 1971.
[66] Community Land Act 1975, section 25.
[67] Local Government, Planning and Land Act 1980, section 101, schedule 17.
[68] Planning and Compulsory Purchase Act 2004, sections 46 to 48.
[69] Planning-gain Supplement (Preparations) Act 2007, section 1(1).

6. Can reducing compulsory purchase compensation promote more housing development?

6.1 A feature of recent debate about land value capture have been suggestions to change the basis of compulsory purchase compensation from market value to existing use value or a multiple of it.

6.2 The Royal Town Planning Institute proposed to amend the 'Land Compensation Act to allow local authorities to Compulsory Purchase land at existing use value'[70]

6.3 Shelter's *Building the homes we need A programme for the 2015 government* proposed that agricultural land owners would receive 'full current use value for their land plus an additional 100% existing use value'. The acquisition of land which was already developed would be at 120% of existing use value.[71] Its evidence to the Select Committee is more general, talking about a methodology that 'does not include all the 'hope value''.

6.4 Nick Boles MP's book *Square Deal* suggested amending the Land Compensation Act 1961 to current use value[72] although he has more recently mentioned a small multiple of agricultural value.[73]

6.5 The Labour Party's *Housing for the Many – A Labour Party Green Paper* proposes to 'enable more proactive buying of land a price closer to existing use value' and as part of this 'consider changes to the rules governing the compensation paid to landowners.[74]

6.6 In *Bridging the infrastructure gap Financing infrastructure investment to unlock housing*[75], Thomas Aubrey proposed amending the Land Compensation Act 1961 for land designated by combined authorities for infrastructure including housing. Those changes would omit the presumptions relating to prospective planning permission[76] with the aim of reducing market values in designated areas to just above use value, assuming a premium for avoiding the costs of undertaking a compulsory purchase.[77] Whilst this is proposed for designated areas, the paper then suggests that all land value increases nationwide could be captured by this mechanism.[78]

6.7 Many proponents of change rely on land acquisition for Milton Keynes as an example,[79] failing to appreciate that it post-dated the Land Compensation Act 1961 and was assembled by what are essentially the current rules. It has also been suggested that industrial sites acquired for the London 2012 Olympics were compensated on the basis of residential land value.[80] However compensation reflected the development potential in the absence of the Olympics scheme, which inevitably delayed infrastructure. Compensation at the main Olympic Park site was resolved at existing use value plus a relatively modest 'hope value'

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[70] *Housing White Paper – Fixing our broken housing market Response to Government consultation* para 48.
[71] *Building the homes we need A programme for the 2015 government*, page 53.
[72] *Square Deal* Chapter 3, http://www.squaredeal.org.uk/square-deal-for-housing/
[73] Hansard, 6 February 2018, vol 635, col 1426.
[74] *Housing for the Many – A Labour Party Green Paper* (April 2018), page 22.
[75] Centre for Progressive Capitalism, June 2016.
[76] *Bridging the infrastructure gap*, page 17. There are two technical errors underpinning this proposal. The first is that even if the presumptions were swept away, the market would still ascribe hope value to the prospect of permission being granted. The second, and more fundamental point, is that even if it is assumed that there is planning permission, market value is assessed in the no scheme world and values can be lowered by the absence of the scheme and its infrastructure.
[77] *Bridging the infrastructure gap*, page 19.
[78] *Bridging the infrastructure gap*, pages 19, 20.
[79] Shelter written evidence to the Select Committee; Nick Boles MP.
[80] *Bridging the infrastructure gap*, pages 18, 19.

premium.[81] The present system of valuing the land without the scheme does avoid the inflation of values by major public schemes. It is unclear how far confining land value in compensation to existing use value or EUV and some fixed supplement will reduce acquisition costs. Given disturbance and loss payments, and the challenges of proving hope value, in many cases it will make little or no difference. In others there is the potential for substantial reductions, but those in turn raise problems of opposition, fairness and human rights.

The scope for affecting private market values

6.8 A number of bodies consider that amending the compensation regime will reduce land values in private sales which are not underpinned by a threat of compulsory purchase: Shelter says 'land starts to come into development at lower values across the board'.[82] *The Land* Question treats this a The reports by the Centre for Progressive Capitalism (now the Centre for Progressive Policy) use land value capture figures for all residential development (excluding office to residential conversions under permitted development). Their 2017 note *Estimating land value capture for England – updated analysis* said:

- Total land value of new builds for local authorities in England 2014-15 was £14.759bn
- Total initial land use value 2014-15 was £2.383bn
- Total land value uplift is at £12.375bn
- Total value generated from section 106/CIL is £2.794bn
- Total value of annual public land sales £0.322bn
- **Total land values not captured = £9.259bn per annum**
- **Total land values not captured over 20 years = £185bn**

6.9 Since these figures have been used in much of the current debate,[83] they are worth examining more closely.

6.10 The base values per hectare for the figures are taken from the Department for Communities and Local Government's *Land value estimates for policy appraisal* (December 2015).[84] These produce land values per hectare but only to appraise 'projects from a social perspective'. They are subject to significant assumptions and exclude planning obligations (including affordable housing) and CIL. The paper says that they 'should not be seen as estimates of market value' and 'it is strongly recommended that they are not used for any other purpose'.[85] Labour's *Housing for the Many* cites the paper's post permission residential value estimates of £2.1 million per hectare out of London and £6.9 million per hectare across England as a whole as the 'price'. That is incorrect. The figures are explicitly not prices and the paper warns that residential figures in particular 'may be significantly higher than could reasonably be obtained for land in the actual market'.[86]

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[81] Compulsory Purchase Association evidence to the Select Committee, para 16 to 20. The Lands Chamber decision in *Halpern v Greater London Authority* [2014] UKUT 116 (LC); [2014] R.V.R. 166 applied a 15% uplift for development potential at a waste site taken for the Olympics.

[82] Shelter written evidence to the Select Committee.

[83] For example in Labour's *Housing for the Many*, page 22; *Reforming the land market*
How land reform can help deliver the government target of 300,000 new homes per year (Centre for Progressive Policy, April 2018); *The Land Question*, Daniel Bentley (Civitas), page 35.

[84] See *Bridging the infrastructure gap*, pages 31, 32 (Appendix).

[85] *Land value estimates for policy appraisal*, page 4.

[86] *Land value estimates for policy appraisal*, page 15.

6.11 The Centre for Progressive Capitalism analysis counts planning obligations and CIL separately, but the £14.759 billion figure for land value with permission for residential development is based on a limited category of sites. The valuation assumes a 1 hectare site, regular in shape, with services running to its boundary and road frontage. There would be no contamination or abnormal development costs, or risk of flooding. The net developable area would be 80% of the gross area.

6.12 The hypothetical development scheme would be 35 two storey 2-4 bedroom dwellings outside London or 269 1-4 bedroom flats in London.[87]

6.13 The absence of contamination or abnormal costs seem to assume a greenfield site, with no need for site clearance, demolition or remediation. No land is lost to strategic landscaping, playing fields, flood avoidance or attenuation or because the site is irregular in shape. Such sites do exist. Where they do, they will tend to be fields on the edges of small towns and villages. They will be relatively easy to build out and can be expected to make a full contribution to affordable housing. Most housing sites are not like that. Brownfield sites will need to be cleared, cleaned or conserved. Even a greenfield site may have pipes or pylons to avoid, flooding to address or archaeology to excavate.

6.14 The biggest sites are sustainable urban extensions or new settlements. These are building communities rather than just housing. Those schemes will involve industrial and office uses, local shopping, community facilities such as a village hall and GPs' surgery, playing fields, informal open space,[88] at least one primary school and possibly a secondary school. A substantial road network will be required, beyond the internal roads of a small estate. Land will have to be set aside for strategic landscaping, set offs between communities and from sensitive sites, flood measures and nature conservation. The net developable area for a new settlement will be much lower than the 80% in the MHCLG calculations.

6.15 The MHCLG policy values do not reflect market values. To take just one example, the MHCLG figure for residential permission in Swindon is £2.12 million per hectare. The viability evidence on a 2017 appeal at Swindon into a new settlement scheme on farmland, the Lotmead part of the New Eastern Villages, worked on a land value of £250,000 to £300,000 per hectare as what a farmer would sell for.

6.16 The near £15 billion figure excludes office to residential conversions under permitted development rights. It can be assumed that if carried out they will generate a positive value and that any planning obligations involved are modest in scale. That is though a modest offset against what appear to be overstated values.

6.17 The initial land use value in the Centre for Progressive Capitalism is taken as the MHCLG agricultural land value for greenfield sites and its industrial value for brownfield sites. Agricultural values averaging £21,000 per hectare can be taken as realistic, although some greenfield sites will be in higher value uses, such as urban gardens or paddocks.

6.18 MHCLG's industrial land value estimates are for sites with planning permission for development of brownfield land for industrial/warehouse use. They are not values for land which is currently in industrial/warehouse use or which has suitable buildings for those uses.

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[87] *Land value estimates for policy appraisal*, pages 15 and 16.

[88] The National Playing Fields Association's standard is 2.15 hectares of formal outdoor sports, play areas and outdoor provision per 1,000 population http://www.fieldsintrust.org/Upload/file/guidance/Guidance-for-Outdoor-Sport-and-Play-England-Apr18.pdf This does not include informal open space. Natural England's Suitable Alternative Natural Greenspace Criteria for the Thames Basin Heaths Special Protection Area are designed to avoid increased recreational pressure on a particular European site by providing other open space to use. They require 8 hectares of SANG per 1,000 population. Where both requirements apply, a 35 dwelling to the hectare site outside London would require almost the same area again in open space.

6.19 The Centre for Progressive Capitalism apply the industrial land use value to all previously developed land, however that is a value for a site with planning permission for industrial development, not a site which is already in industrial use. A site which is in industrial use (or at least with buildings capable of being occupied) will be worth much more. The other flaw is to assume that brownfield sites are all industrial. Many will already be in a residential use and others will be in office or retail uses. Whilst 13% of new residential addresses in 2016-2017 were created on industrial and commercial sites, 12% were on existing residential land, 11% on vacant previously developed land and a further 5% on residential gardens.[89] Sites may also be a mix of greenfield and brownfield; for example, developing a field behind existing housing might require the acquisition and demolition of two houses to provide an access.

6.20 Existing use values therefore appear to be significantly underestimated, particularly for brownfield land. Consideration of existing use value also overlooks the other elements of the compensation code: disturbance and loss payments. In one Olympics case an existing use value of £1,846,200 for a 1.1 acre waste transfer site was augmented by £277,500 of hope value and £453,247 in disturbance, costs of trying to negotiate compensation and loss payments.[90] The disturbance payments for occupied commercial land can be substantial and whilst loss of profits for farmers will in monetary terms be more modest, it may be a proportionality large addition.

6.21 The figures are based on a flawed assessment of existing use values. If compensation were set at a higher level, for example a multiple of agricultural value for greenfield sites, then any gap would be reduced further. The Centre for Progressive Capitalism's 2016 proposal was to remove the presumptions that planning permission would be granted but without, it seems, altering the definition of market value. So whilst land would not be valued as if it had a planning permission which it did not, compensation could still be based on the price that the market would pay for the land with that chance of getting permission. Take an urban, previously developed site with obvious potential for a four storey flatted development. A certificate of appropriate alternative development might say that planning permission would be granted at that time for that volume of residential development, in which case valuation would be on the basis that there was planning permission for that scheme. Even without a certificate, a developer might conclude that planning permission would probably be granted without much difficulty. A valuation would take into account that chance and might give it, say, 70% of the value of a site with permission to reflect the uncertainties and hassle of getting consent.

6.22 The difference between the value of land with residential permission and the cost of acquiring it on an existing use basis is said to be what is available for land value capture. The Centre for Progressive Capitalism figure of £2.794 billion is derived from MHCLG estimates of the value planning obligations in 2007-2008 at £4.9 billion and for 2011-2012 at £3.7 billion, applied to 2014-15 housing figures, assuming that 75% of the value is derived from residential development.

6.23 New MHCLG figures have been produced in the 2018 report *Incidence, Value and Delivery of Planning Obligations and Community Infrastructure Levy in England in 2016-17*. These say that the total value of planning obligations, section 278 highways agreements and Community Infrastructure Levy committed was £6.007 billion. This was made up of £3.972 billion of in-kind affordable housing and £2.036 billion for remainder (including £771 million for local planning authority CIL and £174million in Mayoral CIL in London). 99% of the value

[89] *Land Use Change Statistics in England: 2016-17*, figure 1.

[90] *Halpern v Greater London Authority* at para 185, 188.

of these contributions is extracted from residential development.[91] These are committed figures, the report saying that the Mayoral CIL receipts in the period were £136 million.

6.24 There are some hefty caveats to apply to any of these figures, as the MHCLG research recognises.[92] They are extrapolated from survey data provided by 46% of local authorities. Many of the on-site contributions are not valued at any point in the planning process. There may be a difference between the value of the obligations signed in a year, for development taking place in future years, and what it received from all obligations in any particular year. As MHCLG recognise, obligations can be varied, sometimes reducing the contributions. Occasionally overage arrangements in obligations will release more benefits as values increase. A further factor to add to the contributions are those benefits which are not reflected in obligations because they are secured by condition or otherwise integral to the scheme.

6.25 The Centre for Progressive Policy's figures were a residential consent value of £14.759 billion, initial land use value of £2.383 billion, giving an uplift of £12.375 billion. £2.794 billion of that uplift was taken in obligations and CIL, with £0.322 billion in public land sales, leaving a 'land value not captured' figure of £9.259 billion per annum. However the residential consent value is a serious overestimate, the initial use value substantially underestimated and the obligations/CIL figure may be double that used in the assessment. The 'land value not captured' figure appears to be a very considerable overestimate.

6.26 The ability of developments to contribute to affordable housing and infrastructure is considered at the local level when preparing local plans and Community Infrastructure Levy schedules and, where targets are not being achieved, in determining planning applications. There are concerns about those exercises, some of which are discussed below, but unless they are very seriously deficient, they should strike a reasonable balance between contributions and the viability of schemes.

6.27 Of course, part of the profit which arises from increases in land value is captured by capital gains or corporation tax.

6.28 Beyond the numbers, the notion that there a massive pot of money from land value increases which is readily able to be captured is a fallacy. Other than waiting for death, the closure of a business or moves for personal or corporate reasons, there needs to be a financial incentive to sell land for development. There must be a benefit which makes up for the inconvenience. Even in compensation code terms, a sale at existing use value or close to it does not cover the losses. It is unclear whether the Shelter proposal that developed land could be acquired at 120% of existing use value would allow loss payments and disturbance on top, but even if it did, would provide no encouragement to sell. A farmer will need a real benefit to give up his livelihood.

6.29 A vendor who wants to sell in any event will still want to get their value for the land, rather than letting the buyer have it. Unless a price is imposed on the participants, a sale will reflect any potential for development. That is why the two price system emerged in the 1950s and the restriction on compulsory purchase compensation to less than market value proved to be unsustainable. Imposing an artificially low valuation will not affect land prices except for those occasions where there is a real threat of compulsory purchase. Any change to the compensation code will have no wider effect on land values or land value capture.

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[91] *Incidence, Value and Delivery of Planning Obligations and Community Infrastructure Levy in England in 2016-17*, para 3.22.

[92] *Incidence, Value and Delivery of Planning Obligations and Community Infrastructure Levy in England in 2016-17,* Appendix 1.

6.30 Compulsory purchase is only justified where there is a compelling case in the public interest for the compulsory acquisition of the land. This is a long established policy test which is in broad terms required by the European Convention on Human Rights. The benefits of housing development may be a public interest factor for acquisition but to take land compulsorily requires a convincing explanation as to why those public benefits cannot be achieved voluntarily. That will either be because landowners are not prepared for that scheme to come forward or there are so many landowners or other rights over the land (such as rights of way) that it is not practical to assemble the land by (unforced) agreement. Compulsory purchase would not be justified against a landowner who is willing and able to develop a site for those public purposes in accordance with a planning permission which they could obtain.

6.31 Compulsory purchase will therefore remain a way of helping important development happen rather than a means of the state acquiring development value even if the compensation available was reduced. Past experience is that reducing the compensation available will prompt greater resistance to compulsory purchase, even if it was otherwise justified.

7. Fairness and Human Rights

Fairness

7.1 Restricting compensation to less than market value raises some pretty stark issues of fairness. Market value is after all what something is worth because it is what someone would pay for it. This may include the land's potential for development in accordance with the public interest. The land may have been bought with that potential in mind. A dispossessed owner could therefore be facing a cash loss because of the reduction in the right to compensation. The first question is whether the individual should suffer that loss.

7.2 Secondly a two price system would develop again, with private market transactions reflecting the potential for development whilst deals under the threat of compulsory purchase were depressed. That was recognised across the political spectrum in the 1950s as being unfair.

Human rights

7.3 Article 1 of the First Protocol of the European Convention on Human Rights says:

> "(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> (2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties"

7.4 The second sentence therefore allows for the compulsory acquisition of property provided that this is in the public interest. It is implicit that compensation must be paid, except in exceptional circumstances.[93]

7.5 In *Lithgow v United Kingdom* the European Court of Human Rights considered the valuation of shipbuilding companies in a nationalisation:[94]

> "…the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1. Article 1 does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of 'public interest, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value"

7.6 In the Court's view, what was necessary was 'determining a fair balance between the public interest and the private interests concerned'. The ECHR held in *Gobel v Germany*[95]:

> "Compensation terms under the domestic legislation are material to the assessment as to whether the contested measure respects the requisite "fair balance" and, in particular, whether it imposes a disproportionate burden on the applicant. In this connection, the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate

[93] *Lithgow v United Kingdom* (1986) 8 E.H.R.R. 329 at para 120; *Holy Monasteries v Greece* (1995) 20 E.H.R.R. 1 at para 78.

[94] At para 121. *Lithgow* concerned compensation for the nationalisation of the shipbuilding industry.

[95] (2015) 61 E.H.R.R. 16 at para 45.

interference and a total lack of compensation can be considered justifiable under art.1 of Protocol No.1 only in exceptional circumstances."

7.7 Whether there is a violation involves asking in the particular case whether **'**the person concerned had to bear a disproportionate and excessive burden'.[96] This approach has been followed by the UK courts. In *R(Mott) v Environment Agency*[97] the Supreme Court held it was a breach of a fisherman's rights to restrict his licence to no more than 30 salmon a year when he had been catching 600 salmon, without paying compensation. Lord Carnwath JSC distinguished the lawfulness of controls in general such as the principle of legislation for designating Sites of Special Scientific Interest[98] from the impact of a particular decision on a particular person.[99]

7.8 The European Court of Human Rights has recently considered the adequacy of land compensation in the unusual case of *Vistins v Latvia*. The claimants had been given plots of land within a port, which had been declared at very low value. This land was then made subject to the interests of the public port authority. It was then expropriated by the Latvian government who paid compensation at a small fraction of its value (albeit several times the value which had been declared earlier). The ECHR ruled that a fair balance between private and public interests had not been struck because of the extreme disproportion between the official value of the land and it compensation received.[100] Subsequently the Court held that a sum reasonably related to the market value of the land should be paid. That was still a substantial reduction on the official valuation but in the unusual circumstances of the case, where the land had been gifted at an extremely low valuation, it is difficult to draw firm conclusions about what would be generally acceptable.

7.9 A few conclusions can be reached. Absent exceptional circumstances (which do not arise in UK compulsory purchase) compensation must be reasonably related to value but is not necessarily market value. Whether it is adequate will usually be judged on a case by case basis.

7.10 Legislation which limited compensation to existing use value (or EUV plus some increment) may be lawful (without expressing a firm conclusion either way) however it would have to be exercised in accordance with Article 1 of the First Protocol. A particularly large shortfall between market value and existing use value in a particular case might give rise to a breach. In such situations the compensation would have to be somewhere between EUV and market value to comply with the Human Rights Act 1998 which incorporates the Convention into domestic law. Where the line is drawn cannot be readily judged in advance which provides a further complication for negotiating or litigating compensation. In such cases there would be a 'human rights' uplift to be ascertained and applied. What would need to be borne in mind is that the sites with the largest proportionate land value rises are the most likely to need the compensation increased for human rights reasons.

Conclusion on the compensation code

7.11 A debate about reducing the compensation for compulsory purchase has very little to do with land value capture and no positive contribution to make to promoting housing development. The compensation code has no effect on land sales in non-compulsory purchase situations, where the vast majority of development land is assembled. Where

[96] *Hutten-Czapska v Poland* (2006) 45 EHRR 4 at para 167.
[97] [2018] UKSC 10, [2018] 1 WLR 1022.
[98] *R(Trailer and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 1580, [2005] 1 WLR 1267, see Neuberger LJ at para 68, 93.
[99] *Mott* at para 19-23, 36.
[100] (2014) 58 E.H.R.R. 4.

compulsory purchase is used or seriously threatened, development potential usually has no effect or only a very limited impact on the compensation paid. Development potential which arises from the use of statutory powers, such as a new town or a new railway, is excluded from the compensation assessment by the 'no scheme' rule in any event.

7.12 Cutting compensation to an artificially low level will be seen as unfair in the situations where it makes any real difference. It will also run into Human Rights problems, at least in execution.

8. Planning Obligations

8.1 The need for planning obligations is decided not on the basis of land value but on the impacts of the scheme which need to be addressed. Land value only becomes a factor in ensuring that the affordable housing target in policy is realistic and at the development management stage in reducing the level of contributions.[101] The use of viability assessments to cut contributions has caused concern, some of which is well justified.

8.2 Viability sometimes has a necessary role to play. If obligations are too onerous then developments will simply not proceed. As the NPPF says 'To ensure viability, the costs of any requirements likely to be applied to development, such as requirements for affordable housing, standards, infrastructure contributions or other requirements should, when taking account of the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable.'[102] Land might not even be brought forward for development or if it is, permissions will not be issued or schemes not built out.

8.3 There are though problems with development appraisals which can be addressed by two broad solutions.

8.4 The first solution is to recognise that secrecy about their contents has to end. Often viability assessments have been provided to local planning authorities (or sometimes to an authority's consultants without ever reaching its officers) on a confidential basis. The authority's own evaluation of those assessments has often then been treated as confidential. In such cases third parties have had no ability to question any agreed position of the developer and the authority's officers or consultants that contributions should be reduced on viability grounds. The figures (or a precis of them) would not be presented in the published report or in any other way to planning committee members.

8.5 There is little, if anything, in a development appraisal which is capable of being confidential. In a residual appraisal the sums available for planning obligations are the value of the completed development less the value of the land, build costs, professional and transaction costs, finance costs, Community Infrastructure Levy and the developer's profit. Building costs are usually taken from published rates tables (usually BCIS) and professional fees, transaction costs and finance can be taken from common benchmarks. CIL can be calculated from the published schedule. The developer profit will be taken as a percentage of the value of the development. Any price actually paid for the land will be recorded with the Land Registry and the assessment needs to be done on the price which ought to have been paid. The value of the built out scheme will be derived from comparables in the market.

8.6 The information tribunal has been robust in requiring disclosure of viability assessments. In *Royal Borough of Greenwich v Information Commissioner*[103] a developer sought, and obtained, a relaxation of affordable housing requirements in a signed planning obligation. The First-tier Tribunal considered whether the developer's viability report and the council's consultants' assessment should be produced in full, redacted versions having been ultimately made available. The Environmental Information Regulations 2004 were applied, with consideration of the confidentiality exception in reg 12(5)(e). This was not absolute and the tribunal said: [104]

[101] See 2018 consultation draft NPPF, para 34, 58.
[102] NPPF, para 173.
[103] EA/2014/0122.
[104] *Greenwich* at para 18.

> "We find it particularly hard to accept that the pricing and other assumptions embedded in a viability appraisal are none of the public's business. They are the central facts determining the difference between viability and non viability. Public understanding of the issues fails at the starting line if such information is concealed, and discussion of the "point in time" nature of the viability models is frustrated."

8.7 The tribunal pointed to how much information on prices and costs was widely available. Full disclosure of the reports was ordered, particularly given the importance of the affordable housing issue and the speed with which the developer had acquired the site and immediately sought to reduce the affordable housing contribution agreed by its predecessor.

8.8 The 2018 consultation on the Planning Practice Guidance proposes 'Any viability assessment should be prepared on the basis that it will be made publicly available other than in exceptional circumstances.' That is a sensible approach although it is not apparent what the exceptions might be.

8.9 Making viability assessments available along with all of the other application documents which are currently published will promote public scrutiny and debate. It will enable committee members to go into the detail if they wish. Whilst it is not straightforward to analyse all parts of a development appraisal without expert assistance, a hardworking amateur can expose many of the flaws which could occur. Publication will also enforce a greater degree of consistency and encourage more vigorous local authority scrutiny.

8.10 None of this can be objectionable. If a person wishes an exception to be made in their favour against what would otherwise be required by the public interest then they should be prepared to justify it.[105]

8.11 The second broad issue is the approach to the pre-development value of the land. The higher that figure, the less money there is available for planning obligations. In principle, the value used should reflect the likely planning obligations. For the market to ascribe a value for potential development it will need to take a view on the likely costs of development, including in planning obligations and CIL. Any price paid might be relevant but cannot be determinative. The danger of a market which assumes non-compliance with the policy requirements is that the land used will rise and so the ability to contribute is reduced. For example a 40% affordable housing target becoming a requirement for only 15% in practice. That will serve to increase the price of the application site and other comparables. If those inflated prices are used for the land value in the viability appraisal then they will drive down the sums available for planning obligations. Essentially, an assumption that non-policy compliant development will be allowed becomes self-fulfilling.[106]

8.12 Planning Practice Guidance advises:[107]

> "In all cases, land or site value should:
>
> • reflect policy requirements and planning obligations and, where applicable, any Community Infrastructure Levy charge;
>
> • provide a competitive return to willing developers and land owners (including equity resulting from those wanting to build their own homes); and

[105] Any viability appraisal submitted to a planning inquiry has to be dealt with in public in any event: Town and Country Planning Act 1990, section 321(3).
[106] The circularity issue is a well-recognised danger in viability assessments: see *Parkhurst Road Limited v Secretary of State for Communities and Local Government* [2018] EWHC 991 (Admin) at para 12 per Holgate J.
[107] PPG, para 10-023-20140306.

• be informed by comparable, market-based evidence wherever possible. Where transacted bids are significantly above the market norm, they should not be used as part of this exercise."

8.13 A competitive return for the landowner is explained as 'the price at which a reasonable land owner would be willing to sell their land for the development. The price will need to provide an incentive for the land owner to sell in comparison with the other options available. Those options may include the current use value of the land or its value for a realistic alternative use that complies with planning policy'.[108]

8.14 The *RICS Professional Guidance: Financial Viability in Planning* relies on site value which is to be determined in accordance with the development plan and warns of the need for caution in considering comparable sales which might not be policy compliant.[109]

8.15 One approach to judging the appropriate return to the landowner is 'EUV plus', that is, the existing use value plus a premium to incentivise the sale of the land. The RICS guidance cautions against its exclusive use:[110]

> "One approach has been to exclusively adopt current use value (CUV) plus a margin or a variant of this, i.e. existing use value (EUV) plus a premium. The problem with this singular approach is that it does not reflect the workings of the market as land is not released at CUV or CUV plus a margin (EUV plus). The margin mark-up is also arbitrary and often inconsistently applied in practical application as a result."

8.16 Warning is given in the guidance that EUV plus is a 'very unsatisfactory methodology when compared to the market value approach'.[111] EUV plus does address ways in which the landowner may be better off with a sale to a developer but does not take 'into account the value of the new land use for which the site is to be sold, whereas it might be said that a reasonable landowner would treat that as a primary consideration in valuing his property.'[112]

8.17 The 2018 Planning Practice Guidance consultation proposes the use of EUV plus in development appraisals. The existing use value would be its current use or the value of any existing planning consents. Establishing the premium is more difficult. The draft looks to evidence of comparable policy-compliant transactions.

8.18 The purpose of EUV plus is to set a minimum floor to the price of the land: assessing at what point a landowner would be incentivised to dispose of land for development when there was no other reason to sell. Even judged objectively, rather than by the attitude of a particular landowner, the incentive required will vary and is not simply a fixed percentage of EUV. The cash value of the increase will matter, as will the value of the project and the scale of the increase in values which it will generate. An incentivised landowner will want to feel that they have obtained a fair share of the benefit of the project. The necessary premium will also depend upon the circumstances of the landowner. An investor will want sufficient profit to justify the effort of the sale, recover a fair share and allow reinvestment elsewhere. A residential owner-occupier or industrial occupier will want all of their costs and losses covered with a sufficient bonus for having to go through it. A farmer might want to justify selling up the family farm with a complete change of lifestyle.

8.18 Identifying a premium is easier when carrying out a viability assessment of a development plan since the likelihood of sites coming forward is judged in overall rather than specific

[108] PPG, para 10-024-20140306.
[109] *RICS Professional Guidance: Financial Viability in Planning*, para 2.3.1 and 3.4.7.
[110] *RICS Professional Guidance: Financial Viability in Planning ,* para 3.4.1.
[111] *RICS Professional Guidance: Financial Viability in Planning* , *p*ara E 1.10.
[112] *Parkhurst Road* at para 145 per Holgate J.

terms. When looking at individual sites, EUV plus is one factor in the process. It may be a necessary corrective to comparable sites which appear not to be policy compliant, but cannot be an arbitrary exercise in picking a price for a landowner.

8.19 There are a number of ironies in the debate about the compensation code. One is that hope value in the compulsory purchase context is calculated on the basis that policy compliant planning obligations will be offered. The Lands Chamber is pretty hard-nosed and does not award compensation unless it is fully justified. Assessments used for compensation purposes will be expected to propose the full amount of affordable housing.

8.20 Another is that the compensation payable may be less than the valuation suggested by EUV plus. A compensation valuation which assumes any hope value will be based on the price which would be agreed between a willing buyer and seller. A seller who needs to be incentivised is not a willing seller and may in the market require more than hope value to sell.

9. Levies and taxes

9.1 Keeping levies and taxes simple, rational and realistic is essential to making them work and ensuring public acceptability. Whether the Community Infrastructure Levy is able to overcome its inherent complexities remains to be seen. The Liz Peace recommendations do at least push in the right direction.

9.2 Extracting contributions towards infrastructure from development sites is achieved by planning obligations, CIL and general taxation. Taxation will raise funds from the landowner and developer as well as from the future owners and occupiers of the development. That contribution is substantial.

9.3 Existing developed land will contribute towards infrastructure costs in several ways. Increases in valuations will be reflected in capital taxation and stamp duty land tax. Improved rents will increase business rates and taxable profits of commercial and residential landlords. Changes to residential valuations will be picked up by any future council tax revaluation. Authorities can increase their general tax levies to pay for infrastructure improvements. Most public works have been funded out of general taxation, even if it is financing borrowing. Where projects have a widespread impact or are small but relatively numerous, then the taxpayers will derive some benefit at some point.

9.4 Levying a more local charge on landowners and occupiers who are said to benefit particularly has its own difficulties. Valuing an increase due to a particular project will be difficult given other factors which may alter value and the uncertainties in a valuation process. It would also need to be a bespoke exercise. Whilst betterment on retained land is sometimes applied to offset compensation for compulsory acquisition, that is a rare and relatively expensive process. The recovery of large sums from any particular owner is likely to be contentious. Say 50% of the increase in the value of the land due to infrastructure works could be claimed.[113] A flat which went up in price by £50,000 because of a new underground line would be subject to a £25,000 charge. Many flatowners would be unable to pay without new mortgage borrowing. A commercial owner-occupier or a professional landlord might find themselves in a similar position. As with the 1932 legislation, any significant capital charge would have to be able to be deferred until the disposal or redevelopment of the property.

9.5 Contributions from existing developments are in practice available to be recovered by an incremental process of rates and council tax, revaluation and the taxation of capital gains.

[113] The Town and Country Planning Act 1932 applied a 75% levy.

This paper is based the Compulsory Purchase Association's Annual Law Reform Lecture, delivered by Richard Harwood on 26th April 2018.

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