Compulsory Purchase Compensation - Statutory planning assumptions: a broken system and proposals for reform from the Compulsory Purchase Association

Every year millions of pounds are spent by local authorities, government departments, statutory utilities and railway companies on land acquired by compulsory purchase for town centre schemes, transport, housing and general infrastructure projects.

However, the statutory provisions governing the compensation payable for compulsory purchase are over complicated and out of date. As a result significant funds intended for infrastructure and regeneration are spent instead on extended negotiations and litigation, and compensation payments become unpredictable, unfair and delayed.

A specific area of compulsory purchase law has become particularly expensive and unpredictable and requires urgent reform. In this paper, the Compulsory Purchase Association proposes such a reform.

Where land has redevelopment value, that value can be the basis of compensation. Because the local authority cannot grant planning permission that would conflict with the proposed CPO scheme, assumptions must be made as to what might have been permitted without the CPO in order to reach a fair assessment of compensation. For example, could the dilapidated factory being acquired have been redeveloped for a lucrative housing development or must it have remained in industrial use?

It is the rules governing these assumptions (known as the statutory planning assumptions) that are in urgent need of reform.

The scope of the problem

Between 2003 and 2009, over a thousand CPOs were made in England. Compulsory purchase powers were also sought via Harbour Revision Orders, Transport and Works Act Orders and Hybrid Bills. Huge and vital projects such as the London Olympic Park, Crossrail, Thameslink, and the Channel Tunnel Rail Link (High Speed One) make extensive use of such powers.

Two cases that reached Court in 2007 and 2008 have brought the problems with statutory planning assumptions into the spotlight.

In one case the Court of Appeal accepted that Wandsworth London Borough Council was required to pay £1.6m for a site that both sides agreed had an open market value of only £15,000.

In another, which reached the House of Lords, it was held that all redevelopment compensation had to fall within the very tight definitions of the statutory planning assumptions, or be certificated. This has understandably led to a substantial increase in certification requests which in turn has provided Local Planning Authorities with an extra burden of work for which they are not reimbursed. Certification is also a role which is inefficiently spread across Local Planning Authorities.

These two cases alone have added around £2.5m in additional costs to the respective projects

The problem is not a new one. The Law Commission investigated the problem and came to some firm and acceptable conclusions in its report: *Towards a Compulsory Purchase Code: Compensation* (LC No 286 of December 2003). The Labour government effectively shelved the recommendations; in December 2005 it rejected the proposal for an entirely new code as too ambitious, and requiring too much further work.

We agree comprehensive reform would be a substantial undertaking, albeit a valuable one, but that is not the purpose of this paper. Reform of the statutory planning assumptions is a discrete exercise; the Law Commission has done the research, carried out the consultation, and suggested new rules. Reform now will bring certainty and save money in compensation and on legal costs, by both claimants and acquiring authorities. Reform is a technical exercise, but not complex, and one that will bring enormous benefits.

The Courts have severely criticised the current rules and have urged that their reform should be given every priority. Judicial criticism is found in the House of Lords, the Court of Appeal and the Lands Tribunal. At the national conference of the Compulsory Purchase Association on 16th June 2010, the participants were unanimous that reform was urgently required.

What is the solution?

The Law Commission consulted widely on its proposals for the reform of the compensation rules. In relation to statutory planning assumptions, it recommended rules that address these problems in a simpler, clearer and yet effective manner at Rules 14, 14A, & 15 in its report. The Compulsory Purchase Association urges the Government to enact reforms closely based on these rules in the forthcoming legislation to reform the Town Planning system.

Such a reform will remove a loophole allowing land owners to claim demonstrably excessive compensation in certain circumstances, and effect significant savings in the

implementation of compulsory purchase powers by clarifying the law and reducing costly litigation and delay.

We urge the Government to include this reform in the forthcoming Planning and Localism Bill.

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APPENDIX 1 – Case Studies

In the case of **Greenweb v London Borough of Wandsworth 2008**, land was acquired which formed part of a park and had no prospect of planning consent for any other use. Both sides agreed the market value was £15,000.

However, due to an outdated provision of the Land Compensation Act 1961 the owner was able to claim development value based on land use existing before the 1947 nationalisation of planning consent. The Lands Tribunal and the Court of Appeal had no choice but to find in favour of the claimant and awarded compensation of £1.6m. Both courts acknowledged that the award they were obliged to make was grossly unfair.

The claimant could not have realised such a consent in the "real world" as the entitlement to carry out such development was repealed in 1991. However, the corresponding rule for compensation in the Land Compensation Act 1961 remains in force.

Another, far more widespread problem was exposed in **Spirerose v Transport for London**. This case concerned the assessment of the value land would have had for redevelopment, but for the compulsory purchase.

The details of the case are complex, but the outcome has had a detrimental effect on an already ailing system. Following this case, a claimant can only secure compensation for the full development value of his land if the use meets a very restricted set of criteria (the statutory planning assumptions in s.14 – 16 of the Land Compensation Act 1961) or he obtains a certificate from the Local Planning Authority stating the uses for which they would have granted consent, were it not for the compulsory purchase. This certificate is commonly referred to as a "section 17" certificate as it is provided for in s.17 of the 1961 Act.

The value that may have been secured for any other type of development cannot be compensated except at reduced value on the basis of a future chance of obtaining consent. This is known as "hope value".

Because the statutory planning assumptions are outdated and uncertain, it is common for a claimant to have had a prospect of planning consent which does not fall within the statutory planning assumptions. Because the Spirerose case has established that no use outside these criteria can be compensated at full value unless certificated, the case has led to a significant rise in the number of s.17 certificates being pursued.

This in itself has created a greater administrative burden on local planning authorities who under the current rules cannot recover the cost of considering and issuing certificates. Because of flaws inherent in the s.17 provisions, local planning authorities frequently struggle to issue timely, correctly assessed certificates and this has compounded the problem by leading to an increase in appeals.
Clearer and fairer criteria for receiving compensation for development value, and an improved certification process would significantly reduce the burden on local planning authorities in certifying appropriate uses, and reduce the cost and delay to

the authority acquiring the land and the claimant in applying for and appealing certificates.

APPENDIX 2 – The Compulsory Purchase Association

Founded in 2002, the Compulsory Purchase Association (CPA) is an organisation created to bring together and channel the wealth of expertise in the subject of Compulsory Purchase and Compensation, to promote this important area of work and to foster a basis for best practice.

In doing so it not only provides a sounding board for change in this sphere but makes comment and provides recommendations relating to relevant Law Commission, government department and other Reports and existing /proposed Legislation. As an important adjunct it promotes training initiatives together with opportunities for those in CPO professions to network and share experience and knowledge. It is a fully independent and self funded organisation.

The CPA currently comprises approximately 500 members who are professionals engaged in compulsory purchase on a regular basis representing acquiring authorities and claimants, and employed within the public and private sectors. Our membership predominantly consists of Chartered Surveyors, Town Planners, Solicitors, Barristers, Forensic Accountants, and Land Referencers.

Our Objectives

The objectives for the CPA are to:

• Establish a multi-disciplinary association of persons interested in compulsory purchase.
• Enable free exchange of views, experience and advice.
• Provide correspondence and newsletters to members by e-newsletters and e-mails.
• Promote lectures, seminars, and similar events, on compulsory purchase topics for both members (at preferential rates) and non-members.
• Provide networking opportunities for members Liaise with Universities to provide assistance on compulsory purchase topics.
• Act as a reference point and sounding board for Government, the Law Commission and others on compulsory purchase issues and proposals.
• Promote best practice in all aspects of compulsory purchase.
• Remain independent of all organisations so as to offer balanced and unprejudiced views and advice.

APPENDIX 3 – Technical Summary of Issues

This section sets out in more detail the specific issues requiring reform of the statutory planning assumptions in s.14 – 22 of the Land Compensation Act 1961. It necessarily assumes a working knowledge of compulsory purchase procedures and legislation. Please see the main paper for a broader outline of the issues or contact the Compulsory Purchase Association via the details at the end of the main paper if you would like any further explanation or background.

The current problems

(i) Valuation date and planning policy date are not always the same date

1. The date for the assessment of compensation (the valuation date) is now statutorily defined. Where the land is the subject of a notice to treat, in most cases it is the earlier of the date when the acquiring authority enters on and takes possession of the land, and the date when the assessment is made: see section 5A(3) of the 1961 Act. Where land is the subject of a general vesting declaration, the relevant valuation date is the earlier of the vesting date and the date when the assessment is made: see section 5A(4).

2. However, in a number of circumstances, the date for the ascertainment of the planning status, which may be necessary for the purposes of ascertaining the value of the land taken, is the date of the notice to treat or some alternative date. A number of examples can be given. Under section 14(2) any planning permission which is to be assumed in accordance with the provisions of sections 15 and 16 is in addition to any planning permission which may be in force *at the date of service of the notice to treat*. There is no equivalent statutory provision for the situation where, at the relevant valuation date there exists a planning permission which was not in existence at the date of the notice to treat.

3. Under section 15(1), planning permission can be assumed for the proposals of the acquiring authority where there is not in force planning permission for the proposals that involve development *on the date of the service of the notice to treat*. Again, there is no statutory provision for the possibility of the grant of planning permission for the proposals of the acquiring authority by the valuation date.

4. For the purposes of section 16, the "current development plan" is defined by reference to the development plan comprising the land in question, in the form in which (whether as originally approved or made or as to the time being amended) that plan is the plan in force *on the date of service of the notice to treat*: see section 39(1) of the 1961 Act.

5. Presumably one reason for the date of the notice to treat being the relevant date for the ascertainment of planning status under most of these provisions is that until 1969 that was also the valuation date.[1] Since then the valuation date will differ in all cases from the date of the notice to treat, and may do so in some cases by very many years.

6. In the case of applications for certificates of appropriate alternative development, the House of Lords decided in *Fletcher Estates v The Secretary of State*[2] that the date for identifying planning policies, relevant to the determination of the application, was the date for the purposes of section 22(2)(a) of the 1961 Act, namely the date of the notice of the making of the compulsory purchase order

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[1] *Birmingham Corporation v West Midlands Baptist (Trust) Association (Inc)* [1970] AC 874.

[2] [2002] 2 AC 307

(being the usual case), as the scheme underlying the acquisition must be regarded as cancelled on that date.[3] This date too may be very many years before the valuation date.

7. The principal practical difficulties, which arise in relation to the omission of any statutory provision for planning permissions that exist at the valuation date, are that there can be a considerable gap in time between the date of the notice to treat and the valuation date during which proposals and policies can radically alter such as may prejudice either a claimant or an acquiring authority in relation to the assessment of the open market value at a later valuation date. That was the problem identified by the Lands Tribunal in *Spirerose Ltd v Transport for London*,[4] where the relevant date for the ascertainment of planning policies under section 17 was in 1993, whereas the valuation date was in 2001. It is true that the House of Lords in *Transport for London v Spirerose Ltd*[5] did not consider that the disparity of dates should be regarded as an anomaly, and there was rationality in the date prescribed by section 22(2)(a) of the 1961 because that is the date on which the prospect of obtaining valuable development rights is taken from the owner.[6] The flaw in that approach is that, but for the notice of a compulsory purchase order, the owner might have got valuable development rights prior to the valuation date had no powers of acquisition been proposed.

(ii) references to current development plan

8. The references in section 16 of the 1961 Act to the current development plan, raise the issues as to whether the relevant land consists or forms part of a site *defined* in the current development plan, or forms part of an area shown in the current development plan as an area *allocated* for uses, or where development is *indicated* for the relevant land. But these descriptors or references are all premised on the basis that current development plans contain such references, and that it is in the form by which development and proposals are defined, allocated, or indicated for specific sites. That premise was true in 1959 when the first generation development plans were essentially of a proposed land use nature, and where plans were scaled and detailed. In 1959 plans were not expressed in terms of strategies, objectives, and goals, and the textual description of proposals and diagrammatic explanations did predominate over any scaled plans on which specific sites and properties could then be identified.

9. The effect of the Planning and Compulsory Purchase Act 2004, and its introduction of the third generation of development plans, was to give development plans, and the expression "the development plan", in any enactment, a much extended meaning. For the purpose of any other area in England, the development plan is the regional spatial strategy for the relevant region, outside Greater London, or the spatial development strategy, inside Greater London, and the development plan documents (taken as a whole) which have been adopted or approved in relation to the relevant area.[7] For the purposes of any area in Wales, the development plan is the local development plan adopted or approved in relation to that area.[8]

10. Each region will have to have a regional spatial strategy (RSS): see section 1 of the 2004 Act. Section 17 of the 2004 Act makes provision for local development documents (LDDs). LDDs are documents of such descriptions as may be prescribed in the local development scheme and also in the local planning authorities' statement of community involvement. The local planning authority may also specify other documents, as they think appropriate. The purpose of LDDs is to set out the authorities' policies (however expressed) relating to the development and use of land in their areas.

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[3] Per Lord Hope at p 322: "*The scheme for which the land is proposed to be acquired, together with the underlying proposal which may appear in any of the planning documents, must be assumed on that date to have been cancelled. No assumption has to be made as to may or may not have happened in the past*".

[4] (unreported 16th November 2007).
[5] [2009] 1 WLR 1797.
[6] Per Lord Collins of Mapesbury at [2009] 1 WLR 1833, para 132.
[7] Planning and Compulsory Purchase Act 2004, s38(2)-(3).
[8] Planning and Compulsory Purchase Act 2004, s38(4).

Provision is made for *core strategies*.[9] Further documents, referred to as *submission proposals maps* are other documents that deal with policies relating to identified sites or areas and refer to an Ordnance Survey or other map. In connection with specific sites or areas, the following documents will also be LDDs, and are referred to as *area action plans*: policies relevant to any areas of a local planning authority identified as areas of significant change or special conservation; and documents relating to site allocation policies are also LDDs. Under regulation 7 of the 2004 Regulations, the documents which must be development plan documents (DPDs) are core strategies, area action plans, and any other document which includes a site allocation policy.

11. As explained above, the directions and expressions used in section 16 of the Land Compensation Act 1961, for the application of planning assumptions derived from development plans, do not, in the main, have easy or any equivalents under the new planning regime in the 2004 Act. It is true that the Upper Tribunal (Lands Chamber) in *Urban Edge Group Ltd v London Underground*[10] did decide that the assumptions in section 16(2) had application to the third generation of development plans.[11] Presumably, the same would apply to the remaining assumptions in sub-sections (1) and (3). However, what is not clear is whether every document that constitutes a development plan under the 2004 Act would satisfy the descriptors, in section 16 of the 1961 Act, referred to above, of *defined*, *allocated* or *indicated*. If any reference to development plans is to be retained in any statutory planning assumptions, it should make a more direct reference to the terms of the new third generation plans.

(iii) Scheme cancellation rules

12. The immediate practical effect of the decision of the House of Lords in Spirerose is that claimants and acquiring authorities will now have to place much more reliance on the statutory planning assumptions in section 16 of the 1961 Act, based on the development plan, or on certificates of appropriate alternative development, under section 17. Where, under section 16, it must be considered whether planning permission might reasonably have been expected to be granted, subsection (7) provides that that question must be considered if no part of the *relevant* land were proposed to be acquired by any authority possessing compulsory purchase powers. The position appears to be the similar in relation to certificates of appropriate alternative development, subject to the effect of the decision of the House of Lords in the *Fletcher Estates* case.[12] In that case the whole scheme is assumed to be cancelled on the relevant date under s22(2) of the 1961 Act. But under section 16, the effect of scheme cancellation rule applying only to the land of a particular claimant, and then only as a proposal to acquire that land, is that the scheme as a whole is not regarded as cancelled as such. This can have a significant consequence to the planning policies that may be taken into account.[13] If the scheme of the authority is not to be disregarded, save as to the proposal to acquire the particular claimant's land, this means that any matters attributable to the scheme are not disregarded in ascertaining planning status, but might be disregarded in assessing the *value* of the land under the *Pointe Gourde* principle.

(iv) Certificates of appropriate alternative development

13. There are two principal difficulties with this procedure. First, as identified above, the date for the identification of the relevant planning policies is often many years prior to the relevant valuation date.

14. Second, the application procedure introduces an additional step in the determination of compensation, with the following consequences. (1) An additional step introduces delay and additional costs, with possibly an appeal. (2) Any outcome is not fully determinative of planning status, as the

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[9] Regulation 6 of the Town and Country Planning (Local Development) (England) Regulations 2004

[10] [2009] UK UT 103

[11] *Ibid* : see paras 14, 16 and 20-22.

[12] S17(4): "if it were not proposed to be acquired by an authority possessing compulsory purchase powers".

[13] *Thomas Newall Ltd v Lancaster City Council* [2010] UKUT 2 (LC)

Lands Tribunal may still determine hope value under section 14(3) of the 1961 Act, and it only has regard to any contrary certificate in considering certain planning assumptions.[14] Further, certificates only apply to the land being acquired, and are not applicable to determine the planning status of any retained land. (3) Unlike the Lands Tribunal, which is conditioned to make determinations in a "no-scheme world", local authorities faced with applications for certificates often find it extremely difficult to hypothesise in the terms directed by section 17(3)(a) of the 1961 Act, and its reference to chances of development which, either immediately or at a future time, would be appropriate for the land in question if it were not proposed to be acquired by any authority possessing compulsory purchase powers. (4) The procedure is an unnecessary expense to local planning authorities. (5) The procedure is also unnecessary because the Lands Tribunal is quite capable of, and not infrequently does, make determinations as to the planning status of land in determining compensation.[15]

(v) Planning permission for Third Schedule development

15. The background to this was explained by the Lands Tribunal in *Greenweb Ltd v Wandsworth LBC*.[16] The case concerned a claim for compensation for the deemed compulsory acquisition of land, which had been used for some time as public open space, under a purchase notice. The claimant contended that by reason of section 15(3)(a) of the Land Compensation Act 1961, planning permission could be assumed for any development under paragraph 1(1)(a) of the third schedule to the Town and Country Planning Act 1990; that paragraph concerns the carrying out of the rebuilding as often as occasion may require of any building which was in existence on July 1, 1948, or of any building which was in existence before that date but was destroyed or demolished after January 7, 1937, including the making good of war damage.

16. The original function of the third schedule was to identify the classes of development the development value of which was not nationalised by the Town and Country Planning Act 1947. Under that Act, compensation was payable for a refusal of planning permission for third schedule development. Further, where such land was compulsorily acquired, such as under a deemed acquisition by way of a purchase notice, a landowner was entitled to recover the development value that had not been nationalised. Although the right to recover compensation for a refusal of planning permission for third schedule development was abolished by the Planning and Compensation Act 1991 Act, the schedule was not repealed in respect of compensation for compulsory acquisition. The third schedule therefore remains as part of the statutory planning assumptions for the purposes of the assessment of compensation.

17. In the *Greenweb* case there had been a commercial building and a terrace of houses on the site prior to January 7, 1937, which were destroyed during the war, and there had been some prefabs on the site on July 1, 1948. The Tribunal decided that the effect of section 14(1) of the 1961 Act was that where a particular planning assumption applied, as here, there was no scope for refusing, as a matter of discretion, to apply a statutory planning assumption. Compensation for the acquisition of the site, with the benefit of the assumed third schedule rights, was determined at £1.6m.

18. The Lands Tribunal in *Greenweb* drew attention to the Law Commission's recommendation that section 15(3) of the land Compensation Act 1961, and with it the application of third schedule, should be repealed.[17] The CPA agrees; it is illogical that a landowner cannot obtain compensation for the refusal of planning permission for third schedule rights, the position in the open market, but is compensated on a compulsory acquisition. The Council's appeal was dismissed by the Court of

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[14] S17(3A).
[15] *Pentrehobyn Trustees v National Assembly for Wales* [2003] RVR 140; *RMC v Greenwich London Borough Council* [2005].
[16] unreported 17th September 2007
[17] Towards a Compulsory Purchase Code: (1) Compensation (Law Com No 286, December 2003, para 8.34.

Appeal,[18] which drew attention to the recommendations of the Law Commission, and the costs to the public purse of leaving anomalous provisions of the compensation code on the statute book.

[18] [2008] EWCA Civ 910.

APPENDIX 4 – Law Commission Rules 14, 14A and 15

Please note that the rules set out below are as published in the Law Commission Report *Towards a Compulsory Purchase Code.* The Compulsory Purchase would like to propose small but important changes to the rules before they are enacted.

Rule 14 Planning permissions – actual and assumed
Planning permissions and hope value
(1) For the avoidance of doubt, in valuing the land, the circumstances to be taken into account at the valuation date include:
(a) any planning permission for development which is in force at the valuation date (on the subject land or any other land); and
(b) the prospect, in the circumstances known to the market at that date, of any other such planning permission being granted in the future.

Appropriate alternative development
(2) Account shall also be taken of value attributable to appropriate alternative development of the subject land, in accordance with the following rules:
(a) "Appropriate alternative development" means development for which planning permission could reasonably have been expected to be granted on the assumptions set out in paragraph (b) (on the subject land, by itself or together with other land), on an application considered on the valuation date ("appropriate alternative development");
(b) The assumptions in (a) are that the circumstances are those prevailing at the valuation date, save that:

(i) The statutory project had been cancelled on that date (CPA: *cancelled on the first notice date*);
(ii) No action has been taken (including acquisition of any land, and any development or works) by a public authority, wholly or mainly for the purpose of the statutory project;
(iii) There is no prospect of the same, or any other project to meet the same or substantially the same need, being carried out in the exercise of a statutory function, or by the exercise of compulsory powers.

(c) Account shall also be taken of the prospect, on the same assumptions, but otherwise in the circumstances known to the market at the valuation date, of any other such planning permission being granted in the future.

Rule 14A Alternative development certificate

Application for certificate
(1) For the purpose of determining the permission or permissions to be assumed under Rule 14(2)(a) above, either the claimant or the authority may, at any time after the first notice date, apply to the local planning authority for an "alternative development certificate", in accordance with the following rules (and "procedural regulations" to be made by statutory instrument):
(2) An alternative development certificate is a certificate stating:
(a) the opinion of the local planning authority as to the classes of appropriate alternative development (if any) for which permission is to be assumed on the basis set out in Rule 14(2)(a) (on the subject land by itself or with other land);

(b) A general indication of any conditions, obligations or requirements, to which the permission would reasonably have been expected to be subject.

Appeal to Lands Tribunal
(3) There shall be a right of appeal against the certificate to the Tribunal, by either the claimant or the authority, subject to procedural regulations, which shall include:
(a) Power for the Tribunal to determine the timing and scope of the hearing of the appeal, having regard to any related compensation reference;
(b) In particular, power for the Tribunal to direct

(i) that the appeal be determined on its own, or at the same time as a reference relating to the determination of compensation for which the certificate is required;
(ii) that the hearing of the appeal should take the form of a local inquiry before a planning inspector
(appointed for the purpose by the Chief Planning Inspector), and that the inspector be given delegated
power to determine the appeal on behalf of the Tribunal;

Conclusive effect
(4) Subject to any such appeal, or any direction of the Tribunal, an alternative development certificate shall be conclusive of the matters stated in it for the purposes of assessing compensation.

Rule 15 Provisions not replaced
The following should be repealed without replacement:
(1) 1961 Act section 15(3) and (4) ("Third Schedule rights")

[(2) 1961 Act, section 23 (compensation where permission for additional development is granted after acquisition). *Please note the CPA **does not** propose to pursue the repeal of s.23.*]