

Compulsory purchase

Regeneration CPOs – in a two part special feature, **Stan Edwards** highlights the importance of crib lists to provide a simple aide memoire ■

Part 1 – Context and content

CPOs are of necessity a catalogue of issues in the public interest and a collection of required actions to deliver solutions through the mechanisms provided by statute and guidance. It is important that random facets of the process are collected to, in some way, provide **working lists/schedules** of a range of requirements and activities.

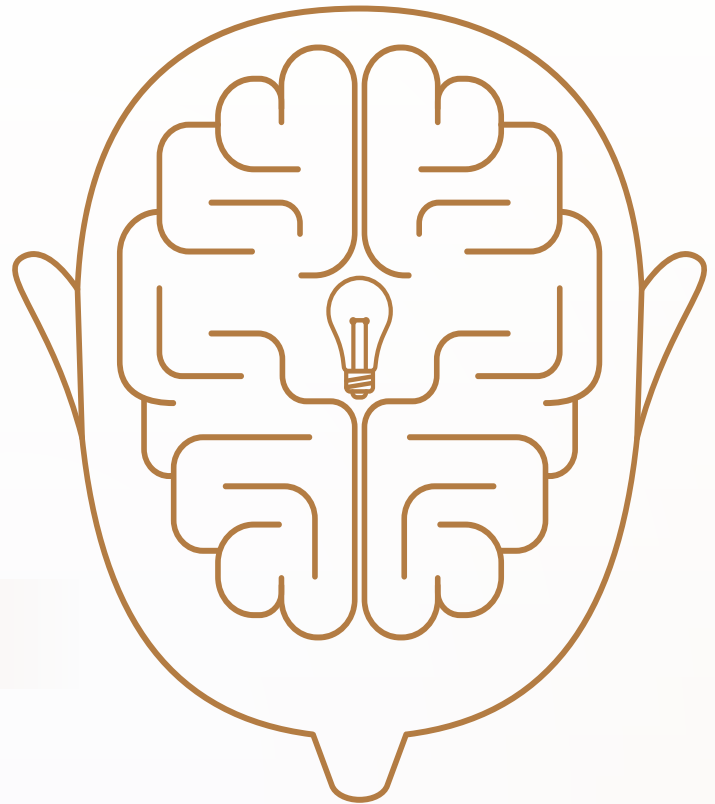
“You have to learn the rules of the game. And then you have to play better than anyone else.” **Albert Einstein**

Avoiding a trip to Mystique

This article is an attempt to provide, to a wider audience, the content of some of the slides provided in a seminar to DCLG and other government departments on the **practical aspects** of promoting a CPO – the same was later rolled out by DCLG to local authorities.

I will receive the accusation that what I provide is too simplistic! However, I take that risk to achieve a simple package for the CPOs for **development, redevelopment and improvement**, providing a basic knowledge to be built upon. The size of the article means that it is covered in two issues. In this issue are notes on:

- strategic concept
- early considerations
- purpose and power
- documents to hand
- core regeneration CPO powers
- funding and finance
- partnerships
- planning
- a compelling case in the public interest
- consultation.



Part 2 will include notes on:

- Circular 06/04
- guidance for inspectors – highway inquiries
- approval in principle (AIP)
- statement of reasons
- check lists:
 - project – the case
 - acquiring authority approvals
 - considerations and assessments
 - CASE – project management
 - Detail.

The challenge

If we are ever to learn from both mistakes and good practice in history, it is necessary in some way catalogue the key points. This certainly applies to compulsory purchase. One of my oft stated mantras is that **CPOs are not difficult** if only you follow the rules! In the noughties there was certainly a pressure by acquiring authority CPO partners to press to apply the rules, not only in a “creative” way but one which blatantly affected individuals’ proprietary rights by pushing those rules to the limits.

It took some time for the **Planning Inspectorate** to cotton-on. It is pleasing that Circular 06/04 is a robust tool not only for promoters but for challengers of CPOs, and certainly for the Planning Inspectorate, who were not left fumbling in the ether. It can be seen in a number of instances that the Planning Inspectorate are now looking more closely into the CPOs brought before them and more often attempting to look at the **intent** behind the statutes and the guidance in place.

My people are destroyed for lack of knowledge¹

The efforts to provide a practical source of consultative advice is an ongoing process, but unfortunately it is becoming a scarce resource. The local authority solicitors of yore with their hands-on experience saw the benefits of consultancy and took their opportunities and moved into the private sector, and were influential in many of the CPOs **over the past 15-20 years** and are now retiring from their labours. Only the larger local authorities are now able to field a core CPO team.

In the past ten years they were able to supplement this with a private practice wing-man lawyer able to comfort them through the process. So is the case with surveyors, particularly those with senior practice/VOA/ large corporation compensation experience, who similarly easily moved to the private sector. In the **1960s/70s/80s** was seen the experience of professionals in the new towns/**Regional Development Agency quangos** (many of whom were previously the surveyors in large local authority corporations) but they too now look for retirement pasture. With so many now leaving, please mind the gap, because the level of professional knowledge/experience in compulsory purchase and compensation transiting the system is not the same as it was 30 years ago!

That era is ending and in the private sector the second generation who may not have the same level of hands-on experience is the source of advice. Yes, there is quality advice, but many local authorities, with increasing cost constraints, struggle to afford quality consultants. Even then the **"pressures to pitch"** cause some consultants to bid, knowing too well that they have only just turned one page ahead of the local authority.

Being one who for most of my years has been involved with the in-house promotion of CPOs, I feel it important to pass on my **"crib sheets"**, limited though they be. These days it is necessary to build and use checklists when faced with promoting or challenging CPOs – they are much cleverer than relying on the memory capacity of the old educated idiot box of a brain! Believe me, these lists are not exhaustive – some obvious points may not be fully addressed, but these are my lists – take them and share them at your peril. Not only does the approach have to be deductive, but inductive as well. It is always necessary to balance form with flexibility to accommodate the distinctiveness of the project.

This article does come with a warning – it is not meant to be coffee table top reading. It may fall into the same category as reading a telephone directory. It also is limited to basic local authority urban regeneration/redevelopment CPOs. The ideas and concepts are however capable of transfer to other CPOs where applicable.

The first schedule shows the basic CPO process from concept. My notes only go in detail up to the point of making and sealing a CPO. Once, whilst discussing **CPO training** with a local authority I was asked to provide my views on the best way to succeed at an Inquiry. My reply was that **anyone can succeed at an Inquiry** as long as they are comfortable with their evidence and its part in justifying the use of compulsory purchase powers. So these considerations are really only up to making and sealing the CPO just prior to submission. Everything up to making and sealing the CPO is not bound by statutory procedures – it is at this point in the procedure that my note stops.

The non-ministerial CPO basic process involves:

- **STRATEGIC CONCEPT and JUSTIFICATION OF PROJECT**
- **JUSTIFICATION OF USE OF CPO POWERS**
- **AUTHORISATION OF PROJECT (outline of delivery mechanisms)**
- STAKE HOLDER REVIEW AND CONSIDERATIONS
- **AUTHORISATION TO PROMOTE CPO – APPROVAL IN PRINCIPLE**
- PROVIDING DETAILED EVIDENCE, DOCUMENTATION
- CONSULTATION
- PREPARATION OF CPO DOCUMENTATION
- TECHNICAL INPUT on the draft CPO – informally consult with the relevant government department (Planning Inspectorate – PINS)
- **APPROVAL TO MAKE AND SEAL A CPO**
- SUBMISSION STAGE
- PUBLIC INQUIRY STAGE
- DECISION STAGE followed by CONFIRMATION (LA)
- POSSESSION, TITLE

The early part of the process needs to be particularly well documented for future use.

Consider sustainability/communities at an early stage in:

THE PROCESS

1. DESK TOP EXERCISE

• **ALTERNATIVES – Demonstrate OPTIONS**

- GEOGRAPHIC – RELOCATION
- ORIENTATION
- STATUS QUO
- REDUCED FACILITY
- EXPANDED REPRODUCTION
- EVOLUTIONARY TRANSITION
- REVOLUTIONARY TRANSFORMATION
- PROPORTIONALITY – RECONFIGURE ?

• **PROVIDE 4 OPTIONS – JUSTIFY**

2. AWARENESS CAMPAIGN – council statement of INTENT

- STAKEHOLDER
- POTENTIAL CLAIMANTS
- PRESS RELEASE
- ALSO AREAS OF GEOGRAPHICAL ALTERNATIVES
- SIFT OPTIONS
- VICINITY(S) NEWSLETTER
- WEBSITE UPDATES
- ADVISE OF
 - CONTACT ROUTE
 - DIRECT TO TEAM
 - THROUGH REPRESENTATIVE TO TEAM
 - THROUGH ELECTED MEMBER TO TEAM
 - CPO PROGRAMME FOR DETAILED INVESTIGATION/ PUBLIC CONSULTATION/ENGAGEMENT

(I) BUILD IN RESPONSES TO CREATE INITIAL ASSESSMENT

(II) UNDERTAKE PRELIMINARY PESTLE (ESE-PTL) and SITUATIONAL ANALYSIS

From the initial assessment of the concept, a refining process takes place to extract the purpose of the project/CPO – provides clarity.

What defines PURPOSE?

Purpose is derived from the formal resolutions or documents of the acquiring authority. Normally the scope of the intended works and their purpose will appear from the formal resolutions or documents of the acquiring authority.²



06/04

14. The PURPOSE

15. Specific power available for purpose

- So, **POLICIES > PROGRAMMES > PROJECTS**
- **RESOLUTION DOCUMENTS**
- These provide **PURPOSE**
- **PURPOSE** derives **PLANNING and POWER**
- **POWER** provides **STATUTORY RIGHTS AND LIMITATIONS**
- The degree of well being assessment as to what is the public interest and justification for CPO powers (these should have flowed from the documentation anyway). This is apart from T&CPA 226 1A
- **RESOLUTION – DOCUMENTS**
- **Approval in Principle (AIP) – DOCUMENTS**
- **Assessment of AIP conditions, including community engagement audit trail – DOCUMENTS**
- **Draft CPO**
- **Technical review**
- **Approval to make and seal – DOCUMENTS**
- **make and seal**

Knowing the **outline requirements** of delivery, it is then appropriate to start marshalling the prime documents and guidelines to be used:

Have to hand ...

- the **empowering Act (READ and apply EMPOWERMENT)**
- **notes on the preparation of land plans and reference schedules**
– e.g Welsh Office Highways Directorate Memorandum TR138 (A) (W) Revised 1990.
- **Circular 06/04 – re-read (NAFWC 14/2004)**
- **Note documents re Appendix Q Circular 06/04**
- **Notes accompanying Statutory Instruments**
- **Encyclopaedia(s) of compulsory purchase**
- **Your own checklist**
- **ESSENTIAL TO USE SOURCE DOCUMENTS**

The local authority requires to know well the core regeneration power available:

Core local authority regeneration powers

GENERAL	KEY POWER	PURPOSES	NOTE
Town and Country Planning Act 1990 by Section 99 of the planning and Compulsory purchase Act 2004	1(a) ... think ... facilitate ... dev, redev, imp. on or relation to the land 1(b) Proper Planning	1(a) 1. Basic wide regen. schemes – 06/04 Append A 2. Housing regen. – 06/04 Appends A & E 3. Community assets – 06/04 Append KA 4. Listed Buildings in regeneration 5. Highways in wider regeneration	Qualification of 1(a) with 1A – Social Economic Environmental 2. Housing in regeneration 3. Community request 4. To restore rather than preserve 5. Highways as part of a wider mixed use scheme NB: Originally 'Suitable and Required', now 'Think will Facilitate'
	(2A)		Crown
	(3) authorised for: (a) executing works (b) common / OS.		
SPECIFIC	Key Power	USES	NOTE
Housing Act 1985 Acquisition of land for housing purposes	Section 17	Development for and acquisition of housing – 06/04 App. E	Specifically for housing. See 06/04 App. E In connection with housing accomm. Sec.12
Planning (Listed Buildings and Conservation Areas) Act 1990	Section 47	PRESERVATION	06/04 Append K NB 1. Beyond preservation then TCPA restoration. 2. Repairs Notice 3. Magistrates Court 4. Management
Highways Act 1980 et seq		Specifically highway purposes under the Act/s	NB Persimmon Case

In application of the power, the following serves as a reminder:

POWERS

06/04

13. An acquiring authority can only make use of the 1981 Act statutory procedures for the compulsory acquisition of land where an enabling power is provided in an enactment. There are a large number of such enabling powers, each of which specifies the purposes for which land can be acquired under that particular legislation and the types of acquiring authority by which it can be exercised.

14. The purpose for which an authority seeks to acquire land will determine the statutory power under which compulsory purchase is sought; and that, in turn, will influence the factors which the confirming minister will want to take into account in determining confirmation.

15. Authorities should look to use the most specific power available for the purpose in mind, and only use a general power where unavoidable. Factors relevant to specific individual powers are considered in Appendices A to K.

Relationship and hierarchy

The most Specific Power UNTIL purposes are so wide as to be ultra vires

RULE OF THUMB

- use the most specific power that encapsulates the whole project
- if the content of the project goes beyond a power granted for a specific purpose then the wider power must be used
- specific, e.g. Highways Act 1980/Housing Act/Listed Building, etc. Act
- wider Town and Country Planning Act 1990 (as amended)

There must be a reasonable prospect the scheme will proceed.

Funding arrangements and finance

Costs – administrative (CPO) costs ... acquisition (claims) ... infrastructure costs.

Funding/appraisal – The acquiring authority must be able to reassure the minister/National Assembly for Wales, and/or an Inspector at an Inquiry, of the financial viability, and be satisfied that there is a reasonable prospect that the scheme will proceed (ODPM Circular 06/04). The acquiring authority must be able to demonstrate that either public funds are forthcoming or, in the case of a joint venture, all or part of the funding will come from a private source. Funding must be identified for the whole scheme.

Can a review of sequencing of developer involvement regarding project delivery enhance a demonstration of a reasonable prospect the scheme will proceed? (06/04 20-22 – note LRFS)

JV agreement terms: if the acquiring authority is acquiring in collaboration with developer or other party if applicable (e.g. Community Development Trust).

Financial – is it viable? Is it compliant?

- **Section 233 T&CPA 1990 governs disposal**
- **Standard Commercial Property Securities Ltd v Glasgow City Council (No 2) [2006] UKHL 50, 2007 SC (HL) 33**
- **Acquiring authority can choose its partner on “best terms”**
- **Can take into account off-site benefits if related**
- Financial viability may be material if it relates to the development, as it can be where it is part of a composite development on another part, as far as that the proposed development will finance other relevant planning benefits may be material. Also, off-site benefits which are related to or are connected with the development will be material. Review Lord Collins judgment in the *Wolves* case (*R (on the application of Sainsbury's Supermarkets Ltd) (Appellant) v Wolverhampton City Council and another (Respondents) [2010] UKSC 20*).

In the absence of public sector funding for projects, partnerships (PPP) are necessary. However, it is important to note here that the local authority partner may be a Community Development Trust (a not-for-profit organisation).

Partnerships

- **PPP Public Private Partnership – special purpose vehicle - agreement**
- **Acquiring authorities have the right to choose their partners if it is line with “best value” and the provisions of Section 233 T&CPA 1990, but this alone is not a CPO criterion**
- **with private sector developers – make sure the dog (acquiring authority) wags the tail**
- **who leads? Acquiring authority!**
- **private sector supposed to take the risk – AA beware of creeping risk off-loading (note Friars Walk, Newport)**
- **who does what?**
- **who negotiates?**
- **authorisations**
- **funding payments mechanisms**
- **technical advisors – who is the client?**
- **exit strategy**
- **indemnity**
- **Standard Commercial Property Securities Limited and others (Respondents) v Glasgow City Council (Appellants) and others (Scotland) 2006 UKHL 50**
- **make sure of accommodation works mechanism – document in agreement**
- **negotiations**
- **preparatory work**
- **timetables**
- **parallel negotiations – informal**
- **alternatives – consider from the outset. Prepare to give reasons**
- **DOCUMENT EVERYTHING! CPOs are an exercise in document handling**
- **make sure the agreement is signed!**

Planning

The project should not be blocked by planning impediments and the planning system should be the first port of call for a project which is, or should be, undertaken for the public good.

- | | |
|------------|--|
| Planning – | ensure that the project is not blocked by planning impediments – apply for permission. Note benefits of a joint Inquiry if necessary. |
| Planning – | to define benefits and liabilities on site (well being & sustainable benefits plus negative affects). retain contributions to well being for CPO purposes. off site benefits: material (CPO) reasonably related (CPO) <ul style="list-style-type: none"> – scale – proximity – composite and connected (policies, programmes, projects) – direction of flow of benefit Feed impacts of Section 106 and CIL into appraisal as appropriate |

REMEMBER WOLVES!

CONNECTIVITY

In the *Wolves* CPO, Wolverhampton CC could not report of authorisation for any connectivity between the schemes in planning terms.

PROXIMITY and REASONABLY RELATED TO

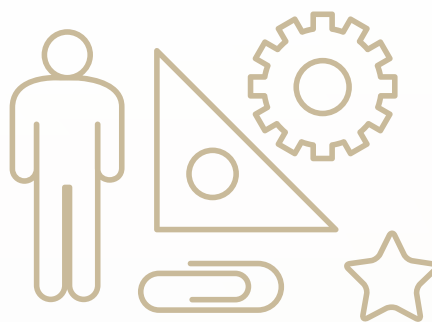
It is important in a CPO to demonstrate the product of a well documented planning audit trail.

For arguing the case for delivery of a scheme it should be easy to provide clearly defined linkages between composite projects, because they were “material”, relevant and “reasonably related” to one another.

MATERIALITY

Section 70(2) T&CPA – that which is material (or relevant) consideration is a question of law, but the weight to be given to it is for the decision maker.

Many CPOs fail to demonstrate the underlying requirement that the Order must show a compelling case in the public interest, significantly justifying interference with an affected party's rights.



Notes on a compelling case in the public interest (CCPI)

- **Section 17 Circular 06/04: Compulsory Purchase and The Crichton Down Rules** “a compulsory purchase order sufficiently justify interfering with the human rights of those with an interest in the land affected.”
- **The JUSTIFICATION** – there must be clear evidence that the public benefit will outweigh the private loss
- **The Human Rights Act 1998 reinforces that requirement**
Human Rights Act 1998 considerations:
Article 1 of the First Protocol to the European Convention on Human Rights (“Protection of Property”)
Articles 6 (right to a fair trial) ... 8 (right to respect for private and family life)
- **Confirming Minister has to be able to take a balanced view.**
- **PUBLIC INTEREST definition** – “The ‘public interest’ refers to considerations affecting the good order and functioning of community and governmental affairs, for the well being of citizens. In general, a public interest consideration is one which is common to all members of the community (or a substantial segment of them), and for their benefit.” (Source OFFICE OF THE INFORMATION COMMISSIONER (QLD))
- **Practicality – PI** should have **SMART** characteristics: **SPECIFIC, MEASURABLE, ACHIEVABLE, REALISTIC** within a **TIME** scale
- **COMPELLING?**
to be “a compelling case in the Public Interest” there must be something making it “compelling”: **CERTAINTY!** **FINANCIAL** (costs), **ASSEMBLY** (of interests), **TIME** (related to a target?), **PROGRAMME** (providing a reasonable prospect that the scheme will proceed in the interests of public propriety)
- **INFLUENCED BY:** SCALE, PROXIMITY, CIRCUMSTANCES
- there must be no stark statement “There is a compelling case ...”. Note New Street Station CPO and related Argos case referring to the Iceland case
- focus upon justifiable (defendable) “prime” compelling case factors (note New Street Station). Refocus the project to achieve a SMART case – Rodney Parade, Newport
- **‘WELL BEING’** (public interest) depends on **NEEDS** (Maslow) **BEING** **MET**. Consider relative weighting/cross impacting Social Environmental Economic (ESE) well being to describe the compelling case.
Cost/Ben: +ve/-ve Proximity: int/ext Timing: present/future
Sector: public/private Risk: frequency/impact
- **WELL BEING (ESE)** relates to sustainability, not just TCPA and CCPI
- **Note 06/04 Appendix KA requirement**

Community involvement/engagement takes place at different levels. Fundamentally the earlier in the life of the project that this takes place the more is the opportunity to consider realistic alternatives. When it comes to actually making the CPO, the compelling case means that the project, by that time, has become fairly fixed and adjustment difficult. This is why documentation from community engagement upstream is so important. Such consultation should be early and effective.

Assessing public interest: consultation

Arnstein	“Ladder of Citizen Participation”
To empower	public participation goal is to place final decision-making in the hands of the public
To collaborate/partner	ongoing mutually beneficial two way partnership between the council and stakeholders where decision-making may be shared
To engage	involves an ongoing mutually beneficial two way partnership between the council and stakeholders
To involve	people actively participate during which the council (acquiring authority) exchanges information with them and seeks their views
To consult	where people are asked for their views on specific policies or proposals to obtain public feedback
To inform	to provide the public with balanced and objective information to assist them in understanding the problem, alternatives, opportunities and/or solutions
Using EU directive EIA criteria (if ever applied to CPOs)	
High Court regarding:	
a) the consultation period should be certain	
b) the consultation should be early and effective (early enough to influence, and effective enough to demonstrate that influence)	
c) the process is the substance	

Footnotes:

- 1 Hosea 4:6 KJV.
- 2 *Waters v Welsh Development Agency*, [2004] 2 EGLR 103, Lord Nichols 63 (5).
- 3 High Court Challenge in the case of *Seaport Investments Limited* (an Environmental Impact Assessment case). In the High Court of Justice in Northern Ireland Queen's Bench Division (Judicial Review) 2007 NIQB

Here ends Part 1! In the September issue of Valuer, Part 2 will deal with fitting the context and content into the CPO process.

Stan Edwards, a Chartered Surveyor, is a Director of Evocati Consultancy specializing in CPO process, and since 2003 visiting lecturer in retail planning and development at Cardiff University. He was formerly Vice-Chairman of the Compulsory Purchase Association, and is now an Honorary Member. He worked on town centre retail and project managing CPOs for over 40 years in Cwmbran, Land Authority for Wales and the WDA. Contact him on stanlje_caerleon@btinternet.com or 07879441697.