



**Stan Edwards** is back with CPOs and retail related regeneration partnerships, plus a trip beyond Iceland ... in the public interest. The article focuses on the CPO case of R (on the application of) Iceland Foods Ltd v Newport City Council<sup>1</sup>. Here a funding developer partner in a city centre CPO failed to perform, and one of the claimants challenged the validity of the CPO at the GVD stage in that the purpose had changed – the challenge failed. Investigating Iceland exposed the world of assessments of public interest for retail regeneration schemes

# A trip beyond Iceland

The *Iceland* case at the end of 2010 highlighted issues relating to local authorities partnering with developer funders in troubled economic times. The case is quite straightforward, but first is a review of the characteristics of retail led regeneration CPOs and the serious issues that arise and are frequently glossed over. Retail dynamics of city growth together with expedient measures undertaken by some authorities causes redevelopment of towns without assessing the consequences. The focus is on how assessments of 'a compelling case in the public interest' are deficient and where current attempts at assessment based just on planning retail impact and T&CP Act s.226 (1A) qualification are woefully inadequate.

## Economics of retail development

Primarily, retailers maximise profit through maximising revenue, so that survival is orientated to demand particularly those functions related to income and consumer preference. The object of retail is to capture consumer spending power, and its competitive nature provides the planning system with a quandary of how to allow and support competitive development whilst attempting to maintain the stability and commercial/social framework of the existing urban structure<sup>2</sup>. This is reinforced by sustainability/well-being policies and statute<sup>3</sup>.

The competitive nature of retail is played down when it comes to CPOs, and is hidden behind the stock, questionable, arguments of supporting existing retail and providing employment. Many retail-led mixed-use regeneration CPOs

glide through the system because of, perhaps, lack of substantial objections and challenge as to what the underlying justification should be. It is perfectly acceptable for developers in non CPO situations to obtain planning, within the bounds of policy, promote and carry out a scheme which may have a collateral competitive affect on traditional adjoining traders.

## Partiality of compensation

However, how can it be in the public interest for the state to reinforce the developer's competitive advantage against the existing traders (outside the scheme) without compensation, or at best without their case assessed and addressed? The focus on compensation is, basically, focused on:

1. all or part land taken
2. claims under Section 10 CPA 1965
3. Part 1 LCA 1973
4. over-ridden rights.

Of all CPO schemes, **those that are retail-led require the greatest scrutiny**, because these are the only ones that may deliberately set out to deliver competition to those not part of the scheme. Those with collateral retail interests adjoining the scheme have no redress in compensation, and must therefore take every opportunity to scrutinise and challenge the underlying wide public benefit relating to the whole town.

## Not just the project and its purpose, but the underlying planned intent of the acquiring authority ...

Too many regeneration CPOs are promoted by political or commercial pressure to

create yet another 'iconic' development irrespective of collateral impact. The arguments of positive economic 'spill-over' effect are made without truly assessing the public interest. There is a distinct lack of investigation, consultation and community engagement regarding matching the political/commercial aspirations for an 'iconic' scheme with the day to day

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struggles of those smaller existing traders that may be affected by the development. The benefit of indigenous traders is immense – indeed, someone once said that 90% of the profit created by local independent retailers stays in the community, while 90% of the profit from new developments/superstores leaves the area.

What is rarely provided, or otherwise asked in CPO challenges, is not the detailed composition of the development/redevelopment/improvement (that is always stated at length) but the public interest justification. The feature of retail demand that is avoided is that of the impact of alternatives, and whether retail projects are substitutes or complements. Nearly every planning and/or CPO scheme will stress that the new development



### DIRECT FUND – Acquiring Authority

- AA CPO – in-house advisors
- negotiate
- pay compensation according to CODE
- Market site after possession
- **All risk, all control**
- Holding costs
- Management issues
- Greater political involvement
- Traditional development CPO

### PARTNERSHIP

Market scheme (developer approach)

Select partner. EU procurement rules

AA CPO partners become advisors.

Who is the AAs advisor? In-house?

Partner negotiates

Pay compensation according to CODE

(plus perhaps something out developers profit)

**In theory**

**Partner/joint risk AA control**

**Partner attempts to**

**Lessen risk ... increase control**

**DANGER – authority accountable**

Depends upon terms of the agreement!

Exit strategy – CPO fail/market fail

Contingency arrangements – CPO content?

Fig. 1

is complementary or at worst neutral. However, many stores in the new scheme will compete with those in the traditional high street, and so the question has to be asked for CPOs as to whether they are:

- complements
- substitutes
- neutral.

This then begs the question as to what is being attempted. Is it:

- reinforcement
- replacement
- displacement

of the city core?

If the intention is **reinforcement**, then, with a pre-let situation, it should be easily capable to demonstrate from the outset how the new shops will complement the well-being of the town. If **replacement**, it is because the core has failed to such an extent that any existing traders within the scheme can be decanted and accommodated.

The greatest problem is created by **displacement**, where an attempt is made to re-establish the retail core in another location in the centre, even plundering the existing high street of some national stores to bolster the scheme. If displacement is to take place, it should be transparently assessed by exposing it to public scrutiny.

### CPO development partners

In the immediate post WWII period regeneration, CPOs were funded by the public sector, but as funding became an issue, so along came the developer/retailer to take the burden from the authority. They brought specialist advisors, but who would fund independent advice to the authorities? Developer partners are

perfectly acceptable in CPO terms as the *Wolverhampton*<sup>4</sup> and *Standard Commercial*<sup>5</sup> cases demonstrated, as long as selection compliance is satisfied. The chart (Fig.1) shows a simple comparison between a partner and non-partner scheme.

The acquiring authority with CPO power is always accountable and, in attempting regeneration schemes with developer partners, should realise that a trade-off takes place, where many times the developer attempts to improve its 'edge' and the authority's public interest role is possibly compromised and eroded. It always leads to a perception and question as to whether the tail is wagging the dog. If the recession taught us nothing else, it made us realise the importance of the terms of the development agreements. Make sure who does what and who is accountable? Who negotiates? Are all the agreed accommodation works translated into the documentation mechanism? What is the exit strategy? Is the Agreement signed?

### Accentuate the positive, eliminate the negative and produce unintended consequences

Whereas 'accentuate the positive' is the mantra for most authorities promoting CPOs, **it tends to be opaque and not sustainable in approach**. These days the public interest is couched in terms of well-being, sustainability and community engagement, and planning framework protected by statute. Many times these terms only feature as glib statements in a Statement of Reasons (SoR) that the subject CPO reflects the appropriate planning national/local policy.

This causes many CPOs to deliver unintended and unacceptable consequences. Robert K Merton<sup>6</sup> in 1936 looked at the sources from which unintended consequences arise. The first two, and most pervasive, were "ignorance" and "error," but the third was labelled the "imperious immediacy of interest." By that he meant instances in which someone wants the intended consequence of an action so much, that he purposefully chooses to ignore any unintended effects. In CPOs we see that many promoters of schemes appear to deliberately steer clear of anything that would highlight an objection/challenge area, so that with no objections and if no special circumstances, the way is clear for a low cost delivery avoiding an Inquiry.

In a world requiring greater transparency, **the acquiring authority should demonstrate that a balanced assessment has been made**. Any new issue presented at an Inquiry should be a demonstration that the issue had not been assessed and addressed through community engagement. The authority's choice is either:

1. minimal assessments and community exercise, hoping that not many will notice and object (traditional CPO), or
2. a genuine attempt at considering the merits/demerits of the scheme to provide an Inspector with specific issues to weigh in assessing compelling case in the public interest.

This was the point described in the recent Inspector's decision in the Tower Hamlets CPO<sup>7</sup>, where he confirmed that Public Law



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principles apply when a private entity is negotiating on behalf of an acquiring authority. **Developers that negotiate alongside or on behalf of public bodies are expected to adopt higher standards** than in private deals. He went on to say that, “the CPO Circular (ODPM 06/04) requires a compelling case in the public interest. The public benefit must, on merit, outweigh the private loss such as to justify the interference with Human Rights. Factors should include the planning framework, well-being of the area, financing and whether alternatives exist.”

#### What happens when funder partners fail

The recession has caused a number of CPOs to fail because the acquiring authority's developer partner had become financially undone. Such a case that characterised this was the *Iceland* case in Newport – in this case the CPO survived. When a CPO is promoted and a funding partner serves to demonstrate a reasonable prospect, the scheme would proceed.

It may be such that the failure is so significant that the acquiring authority may have to start again, or pick up the tab themselves until they find a new partner. Much depends upon the structure and wording contained in the SoR and the authorising resolutions of the acquiring authority.

#### Promoting the Newport CPO

##### Outline

In 2002, Newport CC, supported by the Urban Regeneration Company, Newport Unlimited, began promoting a CPO to

redevelop part of the city centre in an area abutting the traditional core prime shopping area of Commercial Street. In 2005, expressions of interest were subsequently invited, culminating in Modus Corovest Newport Ltd – (Modus) as the preferred developer. A CPO<sup>8</sup> was made in 2006 to redevelop the existing built development to provide a mixed use retail/leisure /residential development with parking and works to the bus station. The proposed development is to be annexed to Commercial Street. The scheme was empowered by the Section 226 (1)(a) of the Town and country Planning Act 1990 as amended and fulfilled the qualifying well-being condition of s.226 (1A). The purpose was for redevelopment and this power was appropriate.

#### Planning background

The SoR of the CPO confirmed elements of the planning background that the scheme:

- followed Tan 4<sup>9</sup> to “support a positive approach to growth and promote, not just protect established centres.”
- followed UDP 1996-2011 Policy SP18 “... that retail proposals in or adjoining the city centre ... will be permitted where they enhance the retail function of that centre.”
- was to respond to the Central Area Master Plan which inter alia requires the “Revitalisation of the city centre and the addition of retail opportunities to complement Commercial Street.”

#### Public Local Inquiry

Statutory objectors to the scheme included a number of parties including

Iceland Foods (Iceland). Iceland put forward proposals whereby Iceland would be excluded – such proposal was not accepted. The Inspector stated that, “The Order is required to facilitate a regeneration scheme where the need for regeneration is not in dispute ... Whilst the objectors to the scheme raise concerns about its effect on their own particular interests, there is no challenge to the acquiring authority's case that the redevelopment scheme will achieve regeneration that will contribute to the economic, social and environmental well-being of its area.”

In March 2007, the Inspector recommended to the Welsh Ministers that **there was a compelling case in the public interest** and the scheme should be confirmed, which it was without challenge. On 4th April 2007 Newport CC gave notice of confirmation of the CPO and notice of its intention to make a GVD.

#### The Iceland case

By 16 June 2009 it had become clear that Modus, in financial difficulties, was unable to fulfil the terms of its development agreement with the Newport City Council, and the Cabinet resolved:

- to complete all outstanding acquisitions under the Order
- not to extend the Modus Corovest development agreement (due to expire – July 2009)
- to draw up proposals to re-market the site
- to seek financial support from external sources in order to advance the provision of a major shopping development in the heart of the city.



**The GVD was executed in November 2009**, despite Iceland's assertion that this would be illegal, and its notice of making served on 21st December 2009

#### Iceland's challenge

Iceland's legal challenge was on the grounds that an execution of GVD was unlawful because:

1. its purpose was different from that for which CPO was made and confirmed
2. it was contrary to claimant's human rights.

The Judge referred to the *Simpsons Case*<sup>10</sup>, where CP power is authorised for a particular statutory purpose, it cannot be exercised for a different or collateral purpose. **The Judge pointed to the confirmation letter** which referred to the carrying out of a comprehensive scheme of development, including many and various different land uses, but not by a specific developer or company. The purpose of redevelopment derives the power defined by TCPA s226(1)(a) and (1A), and defined in the subject Order. So, throughout, the process the development purpose had not changed. The *Iceland* case turns on its facts – the drafting of reports, the CPO and SoR are of key importance in these instances.

#### Viability

At the time the Order was made, it was stated in the SoR that the 'development agreement is currently at an advanced stage of negotiation' – it was unsigned. At that time it was questionable that there was a reasonable prospect that the scheme would proceed – it got signed by the time of the Statement of Case for the Inquiry.

Eventually Modus failed in the downturn with the council, picking up the tab until a new developer could be found. Newport CC were always accountable, and had demonstrated an intention to progress the scheme seeking another developer.

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**Iceland argued the scheme was unviable**, and the council would just 'land-bank', facilitating an unspecified development in the future. The Judge, in reading as a whole the relevant reports that Cabinet were being advised "to take a course of action which will best facilitate the carrying out of a redevelopment scheme at John Frost Square", significantly held that the site was to be re-marketed on the basis of existing terms and conditions, and that the permitted scheme could (in Cabinet's view) still viably be delivered, obtaining alternative funding by another developer.

Newport City Council, in October 2010, decided to seek a developer partner which is the current status.

#### Timing and nature of challenge

The Court found that it is the administrative act of executing a GVD that is challengeable by way of Judicial Review, rather than the decisions that precede this. **The usual challenge period is six weeks after CPO confirmation**. Even

so, the GVD had not been executed for a different or collateral purpose. The process of executing the GVD did not constitute an unjustified infringement of human rights.

#### Iceland and Wolves – T&CPA 1990 Sec. 226 (1)(a) & (1A)

The *Iceland* and *Wolverhampton* cases are not alone in demonstrating a common error of CPOs flowing from a distinct lack of understanding of statute, and a misunderstanding of CPO guidance in many quarters engaged in the CPO process relating to Section 226 of the Town & Country Planning Act 1990 (as amended). Is it so difficult that it is only for the courts to decide? Surely not! Are some of the parties not reading the instructions on the label on the tin? To rehearse requirements for a local authority regeneration CPO:

1. Planning assessments, e.g:
  - a. Retail impact (a facet of economic well-being)
  - b. Environmental Impact
  - c. TIA.
2. Compulsory purchase assessments:
  - a. **Planned (strategic) intent – public interest:**
    - i. "a compelling case in the public interest" This is a wider assessment of well-being and community impact than the Section 226 (1A) power qualification (which only looks at positive issues – 'contributes'). It is wider than any of the usual planning policy assessments such as a RIA. The mistake by promoters and challengers alike is that



these limited planning and power assessments are substituted in Statements of Reasons in place of a proper comprehensive assessment of public interest. So:

- a. What is the stated position in the planning framework (National & Local Policy and Master Plan<sup>11</sup>)?
- b. Does the development align with this?
- c. Has the community been specifically engaged?
- d. If not a, b and c, then carry out a comprehensive assessment, including community engagement, to demonstrate the public interest has been assessed and addressed.
- ii. Justification of the use of CPO powers ... to sufficiently justify interfering with the human rights of those with an interest in the land affected, the public benefit should outweigh the private loss<sup>12</sup>.
- b. **Purpose.** In terms of being contained in the scope and works in the documentation of the acquiring authority. To facilitate development / redevelopment/improvement. Purpose defines power.
- c. Power
  - i. Exercise of Sec.226 (1)(a) "... authority think ... will facilitate ... development, re-development or improvement ..."
  - ii. Qualification S.226(1A) – must not exercise the power under Section 226 (1)(a) unless ... re-development ... is likely to contribute to the achievement ... promotion or improvement of the economic/ social/

environmental (ESE) wellbeing ...".

### **Beyond Iceland – ‘But wisdom is justified of her children’**

In the *Iceland* case, the T&CP Act powers were never the problem, but it could be argued that **a compelling case in the public interest was flawed**, and therefore also human rights. The Inspector dealt with the case as presented, and with no-one to highlight the defect he recommended confirmation. Investigating *Iceland* caused a deeper look at the confirmed Newport CPO. Consider:

1. It will be recalled that the SoR stated that the development responds to TAN 4, the UDP and the acquiring authority's Master Plan, which requires the revitalisation of the city centre and the addition of retail opportunities to complement Commercial Street – there is no evidence of an assessment to support this. The press reported that Modus had negotiated with M&S to leave their location on Commercial Street and move into the scheme. How viable was the scheme if it had to damage the very thing it was to reinforce? The intention relating to the traditional trading centre, Commercial Street, became obvious. After the result of the *Iceland* case it was reported that M&S and other stores were considering a move to a retail park on the edge of the city. Apparently once the decision to move was made it seems then not to matter where – any move impacts negatively on Commercial Street. Planning impediment to CPO?
2. There was no mention in the CPO documentation of community engagement or meaningful engagement with the existing traders in respect of the CPO process.

Newport CC have now sought a new developer based in its stated intention to do so, and the Judge's decision in the *Iceland* case, but still the impact on Commercial Street remains unresolved. **The council have implemented a review of the Master Plan**, investigating the retail aspects of the traditional centre and how

it can be improved, but the remit to the consultants is not to consider the impact of the CPO scheme! Assessment of public interest?

I leave you to ponder on the above facts in the light of the public interest. Impact on the traditional centre is not just Newport's problem – **it is very widespread throughout the UK**, and lack of adequate assessment delivers unintended consequences. There is a need to know the composition of retail lettings and an assessment of intended public interest impact – positive and negative. Was it assessed, was it addressed? ■

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### **Footnotes:**

- 1 R (on the application of ) Iceland Foods Ltd Claimant v Newport City Council – Defendant Neutral Citation Number: [2010] EWHC 2502 (Admin) Case No: CO/2654/2010 In the High Court of Justice Queen's Bench Division Administrative Court at Cardiff
- 2 Planning Policy 4 (PPS4) & Planning Policy Wales (PPW) Chapter 10
- 3 PPS1 & Sustainable Communities Act 2007 (England)
- 4 R (on the application of Sainsbury's Supermarkets Ltd) (Appellant) v Wolverhampton City Council and another (Respondents) [2010] UKSC 20
- 5 Standard Commercial Property Securities Ltd v Glasgow City Council (No 2) [2006] UKHL 50, 2007 SC (HL) 33
- 6 Merton, Robert K. Sociological Ambivalence and Other Essays. New York: Free Press, 1976. Article 1936 "The Unanticipated Consequences of Purposive Social Action"
- 7 The London Borough of Tower Hamlets (Heron Quays West, Canary Wharf) Compulsory Purchase Order 2009 & "Inspector slams Canary's CPO tactics" by Richard Heap, Property Week 01 April 2011
- 8 Newport City Council (Redevelopment of John Frost Square) Compulsory Purchase Order 2006
- 9 Technical Advice Note "Retailing and Town/City Centres"
- 10 Simpsons Motor Sales v Hendon Corpn [1964] AC 1088
- 11 Appendix A Circular 06/04
- 12 Circular 06/04 (19)