COMPULSORY PURCHASE ASSOCIATION

4 May 2013

Jeanne Grey
Department of Electronic Communications Division
Department for Culture Media and Sport
Fourth Floor
100 Parliament Street
London
SW1A 2BQ

jeanne.grey@culture.gsi.gov.uk; jeanne.grey@bis.gsi.gov.uk

Dear Ms Grey

Enactment of the Recommendations of the Law Commission: Report No.336 – The Electronic Communications Code

I write on behalf of the National Committee of the Compulsory Purchase Association in relation to your Department's intention to give early legislative effect to the recommendations of the Law Commission in relation to the Electronics Communications Code. The Association's objective is to work for the public benefit in relation to compulsory purchase and compensation in all its forms. This includes promoting the highest professional standards amongst practitioners at all levels and participating in debate as to matters of current interest in compulsory purchase and compensation. The CPA has some 500 members practising in this field, including surveyors, lawyers, accountants, planners and officers of public authorities. Many of the Association's members are engaged in work in relation to statutory wayleaves, such as those arising under the current Electronic Communications Code ("the Code"). The Association is frequently consulted by government departments, and has successfully promoted legislative changes that have brought clarity and certainty to the law.

We understand that you will shortly be advising Ministers, and in due course instructing Parliamentary draftsmen, in relation to the Law Commission's recommendations. We further understand that your Department may not necessarily initiate the usual consultation process in relation to any proposed primary legislation on the basis that the Law Commission itself carried out an extensive consultation exercise. Indeed, the Association does not wish to take issue with any of the policy recommendations of the Law Commission; our concern lies in the consequential drafting of the legislation, particularly in regard to the compulsory purchase and compensation implications of the recommendations, and in particular the recommendation relating to the measure of the "consideration" in Chapter 5 of the Law Commission's Report. Our concern is that any consequential rules should satisfy the following criteria: (a) giving effect to the policy recommendations; (b) having practical workability; and (c) having legal certainty. Having regard to such criteria, we make the following comments which we urge should be taken into account in settling the consequential rules that give effect to the recommendations in Chapter 5 of the Law Commission's Report.

1. The Law Commission recorded that its consultation had not produced evidence that could justify the Commission recommending a “no scheme” pricing basis in the public interest: see paragraph 5.76. It reached that conclusion in consequence of consultations that indicated that there have been market comparators to assist the determination of a "consideration", that a “no scheme” compulsory purchase approach would inappropriately benefit Code operators, and adversely affect landowners, and cause a substantial change in what has been, in effect, a free market as between Code operators and landowners. The Law Commission therefore recommended that the measure of consideration, payable under the revised Code to those against whom an order is made for the imposition of Code Rights, should be market value of those rights, using the definitions in the “Red Book” (RICS Valuation – Professional Standards): see paragraph 5.83. The Commission recommended that that measure should be modified by the two assumptions at that paragraph.

2. We first point out that the “market values” adopted under the present Code, and therefore the value comparators available, have arisen in the context of three highly relevant factors: first, the uncertainties of the present Code have deterred Code operators from using its dispute provisions, with the likely consequence of payments being enhanced to avoid recourse to those dispute provisions. Second, the rapid expansion of demand by Code operators in the past for mast sites, and with some competition for the best sites, coupled with an urgency to complete networks as quickly as possible, has resulted in Code operators paying generous consideration to acquire sites as quickly as possible. Third, in many cases, particularly in relation to mast sites, the "consideration" has in consequence of the first two factors included a "special value" attributable to a "special purchaser" (as explained further below). Thus, in recent years, the negotiating weight has favoured landowners to a significant degree.

3. It is the belief of the Association, based on the very considerable experience of its members, that each of those factors will no longer have the same relevance in the future, and particularly if the Code is revised, and the negotiating weight will move towards the Code operators. Our reasons are as follows. First, if the revised Code has a more certain definition of "consideration" and the dispute mechanism will be the Upper Tribunal (Lands Chamber), many more disputes will be referred, or threatened for referral, than at present; generally in cases like this well resourced bodies with statutory powers have an advantage in such situations. Second, with a "mature" market, less demand for new sites and sharing agreements reducing the demand for sites, the market "price" for mast sites will fall. Third, subject to what we say below, any part of the "consideration" that includes "special value" to a "special purchaser" would fall to be disregarded under the "Red Book" definition of "market value".

4. Subject to the “no scheme” rule, and the meaning and effect of the two assumptions advanced by the Commission at paragraph 5.83, there is no substantive difference between the “Red Book” measure of market value and the definition of open market value in rule (2) of section 5 of the Land Compensation Act 1961, save as to one point. That point concerns "special value" and a "special purchaser", which we consider below.

5. Unless careful drafting is adopted, we do not see why the “no scheme” rule should therefore not apply to the “Red Book” measure of market value. If that measure is adopted, it will arise in a Code where Code Rights may come to be imposed against a landowner, and we see no distinction between the compulsory imposition of Code Rights, under a revised Code, and the compulsory imposition of access rights as were considered in the decision of the Supreme Court in Bocardo SA v Star Energy UK Onshore Limited [2011] 1 AC 380, where the “no scheme” rule came to be applied on the basis that compulsory purchaser principles were invoked and the "no-scheme" rule was directed to the meaning of "value".

6. Accordingly, we say that unless the “no scheme” rule can, in some way, be negated in drafting the Revised Code, if that is the policy intention, we believe there is a high risk that the “no scheme” rule will come to be applied by the Upper Tribunal (Lands Chamber) to the meaning of "market value", even where the "Red Book" definition is used.

7. Two consequences will then follow: first, Code Operators are more likely to refer, or threaten to refer, Code Right issues to the Upper Tribunal if they can reasonably anticipate a “no scheme” measure coming to be applied. Second, Code Operators will be encouraged to determine existing agreements at the first opportunity if this will result in lower rents.

8. We point out that the “Red Book” definition of market value has its own rules for disregarding “special value”, and “a special purchaser” for whom a particular asset has a special value because of its advantages that would not be available to other buyers in the market: see paragraphs 44 46 of the International Valuation Standards, incorporated in the “Red Book” definition. We point out that in most circumstances where mast sites have been acquired in the past, the market value that then became payable may well have included a “Special Value” in those cases where no other additional Code Operator was then in the market for a particular site. Accordingly, on the application of the “Red Book” measure “special value” would be disregarded. We believe that that situation will become even more common because, with increased shared access arrangements, the potential for more than one Code Operator to be in the market for a particular site at any particular time, so as to avoid the application of the “Special Value” disregard, could be minimal.

9. We now turn to the assumptions at paragraph 5.83 of the Law Commission’s Report. We understand that the first assumption, namely that there is more than one suitable property available to the Code Operator, may have been included by the Law Commission to negate the application of the “special value” disregard in the “Red Book” measure. We are of the opinion that it will not have this effect. First, if the “special value” disregard is to be disapplied, and the situation posited by a "special purchaser" avoided, then an assumption is required that there is more than one Code Operator for whom the property in question is suitable. Second, an assumption that there is more than one suitable property available to the Code Operator is premised on the basis that there is more than one landowner in the market able to provide the property required by the Code Operator in question. It follows that the assumption will actually have the opposite effect to, what we believe, was the intention of the Law Commission.

10. We also point out that an assumption that there is more than one suitable property available opens up difficulties about the location of that property, operability issues and as to its ownership, such as where the only suitable alternative properties are owned by the same landowner.

11. As to the second assumption, it is proposed that under the revised Code, the Code Operator will have the entitlement to upgrade or share apparatus, or to assign the Code Rights in accordance with the Commission’s recommendations at paragraphs 3.24 and 3.51. We comment that the landowner is therefore required to allow such upgrading, sharing or assignment, but will not be paid any consideration to reflect these extra benefits, notwithstanding the adoption of a “market value” measure of consideration. Accordingly the "consideration" will not reflect the right imposed on the landowner.

We therefore urge that if it is policy that a market value measure is to be adopted without the risk of invoking the “no scheme” rule, and to preserve the “special value” which has been the feature of most market transactions with Code Operators in the past, then very careful attention to the drafting of the Rules will be required.

Members of the Association have considerable experience in these matters and the National Committee would be happy to be further consulted if this will assist the Department.

Yours sincerely

Richard Honey

Richard Honey
Chairman, CPA

cc. Bob Segall, DCLG (Robert.Segall@communities.gsi.gov.uk)