

Changing behaviours through constructive engagement - Rule 6 Disturbance Compensation

– Adrian Maher, Aspire CP

Effective and constructive dialogue at an early stage is a proven strategy from best practice globally. How can the UK system be improved so that meaningful early engagement is embedded in the DNA of projects?

1.0 Background

1.1 In advance of the 2016 Stakeholder meeting Adrian Maher authored a note that identified the culture of adversarial behaviours within the compulsory purchase sector. Adrian's note considered that the issues associated with a lack of engagement with affected parties in many cases prior to an application for an Order. The 2016 paper concluded by stating: *'The CPA perceive that without radical change in behaviours the potentially huge increase in workload could threaten the credibility and acceptability of compulsory purchase.'*

1.2 The principle of Early Independent Valuations (EIVs) has since gained support within the industry and Jonathan Stott is presenting a paper to the 2020 Stakeholder meeting on the latest proposals. This will form a central part of assisting both acquiring authorities and claimants to make informed decisions, based on an early better understanding of likely 'market value' compensation. However, the 2019 working group on EIVs also considered that EIV's are only one part of the equation in ensuring that engagement with landowners is truly effective and meaningful. The assessment of disturbance¹ compensation is not based on the value of land and therefore requires a different approach to encourage early engagement.

2.0 Introduction - the issue

2.1 The framework for the determination of the authorisation of compulsory purchase powers is well established through the development of statutory compulsory purchase principles and the development of human rights legislation. It is a necessary balance between the public and private interest with the key test as to whether compulsory purchase powers should be granted applying at the decision stage.

2.2 Prior to the making of an Order the process is dictated by guidance. Government guidance, *"Compulsory Purchase Guidance and Cichel Down Rules"* ("**Guidance**"), applies to Compulsory Purchase Orders and by analogy to other types of Orders states that *"compulsory purchase is intended*

¹ Section 5(6) Land Compensation Act 1961

as a last resort” and expects acquiring authorities “*to demonstrate that they have taken reasonable steps to acquire all of the land and rights included in the Order by agreement*². It rightly suggests that compulsory purchase should not be used unless necessary, however the way the Guidance is worded creates a few obstacles to encouraging appropriate engagement:

- a. In some cases it is felt that efforts to acquire by agreement are a ‘tick-box’ exercise – the focus is on acquisition not impact. Acquiring authorities may do the minimum necessary to overcome this “procedural hurdle” especially where it is clear a CPO is very likely to still be required even if a few of the interests could be acquired in advance.
- b. In many cases the attempts to acquire before an Order is made or sought causes immediate friction with affected parties who see it as an attempt to buy them off before they have had an opportunity to object. This is particularly the case with Transport and Works Act Orders and Development Consent Orders where planning permission is also sought alongside compulsory purchase powers. Acquiring authorities are frequently accused of trying to acquire the relevant land or right rather than engage on the issues an affected party wishes to discuss.
- c. For larger Orders, it is practically impossible to acquire all land and rights included in the Order before it is made or application is submitted.
- d. It does not acknowledge that it may be appropriate in some cases for agreements to acquire to be entered into dependent on the outcome of necessary consents although in practice that is often what happens.
- e. Where other consents are being sought alongside compulsory purchase powers, (e.g. under the DCO regime), that acquisition in advance may not be advantageous to either the affected party or to the acquiring authority until the outcome of the decision on the consents required is known.

2.3 Other issues affecting constructive engagement before an Order is made or applied for are;

² Paragraph 2 of the Guidance

- a. There is no statutory obligation on acquiring authorities to pay affected parties their reasonable fees in understanding the impact of the scheme until after the compulsory purchase powers have been vested. This could be a considerable time after an Order or an application for an Order is made and sometimes not until after the Order is confirmed. Whilst some fees may be paid by AA in engaging with objectors, many affected parties are at risk that professional advice they seek will not be compensatable and hence do not wish to incur the professional fees required for meaningful engagement.
- b. Occupiers are often short term leaseholders where there is little inherent land value. They are not interested in selling and are mainly interested in the impact on their occupation or logistics in relocating. However, the acquiring authorities focus is often on the requirement “...to demonstrate that they have taken reasonable steps to acquire all of the land ... by agreement” and it is often difficult to engage meaningfully with this group at an early stage. Considerable resources can be incurred by acquiring authorities in laying a paper trail of failed engagement attempts to acquire their interest when the focus would be better spent on engaging on issues such as relocation. Many such occupiers simply see compulsory purchase as a distraction to their business and hope it will fail and go away. As a result in these type of cases seeking to acquire in advance of the Order can often be seen as a the tick box exercise from the acquiring authority perspective knowing that engagement with the occupier on acquisition will be minimal.
- c. Occupiers need to plan their business. What they want are details of when possession is required, the notice period, certainty as to compensation etc. However an acquiring authority wish to maintain flexibility in design and hence construction method statements and detailed programme etc. are only available once the main contractor is appointed which is normally after the inquiry. The best which can be offered by acquiring authorities on program is something indicative with possible commitment on notice against milestones. Occupiers are frustrated that the project design has not evolved to a sufficient stage to provide them the information they require. Expectations need to be managed.
- d. The Guidance says Authorities should “consider”³ steps to help those affected by a compulsory purchase order. Contrast this with a requirement in guidance to acquire all to acquire all land. It is not surprising this difference in emphasis is driving the wrong behaviour to achieve meaningful engagement.
- e. Those who object or shout loudest are often prioritised for early engagement. The remainder receive the minimum engagement either through public consultation or attempts to acquire their interests.

³ Section 19 of the Guidance sets out some sensible issues which acquiring authorities should consider.

3.0 The proposal

3.1 The CPA believes that the focus of the Guidance should be changed to move more towards ensuring acquiring authorities have engaged with affected parties, understood the impact on them and ensured that their proposals as part of the Order they are seeking will address those identified issues whether through the existing statutory regimes or through non-statutory policies or the terms of the Order (e.g. protective provisions). This would not alleviate a requirement in appropriate circumstances to attempt to acquire necessary interests in advance of an Order or application for an Order but sit alongside it.

3.2 The CPA believes that an approach of this nature would remain within the existing compulsory purchase principles and human rights legislation and in fact create a more focused requirement on acquiring authorities in analysing and responding to the impact of their proposals on the private interest which goes to the heart of the proportionality test.

3.3 The CPA's proposal is twofold:

- a. That a Compulsory Purchase Impact Assessment should be submitted as part of the application documents for any type of Order where compulsory purchase powers are sought.
- b. Government guidance is amended as indicated above to focus more on proposals to mitigate assessed impact than attempts at acquisition in all cases.

Compulsory Purchase Impact Assessment

3.4 Dealing first with the Compulsory Purchase Impact Assessment concept. Set out how the acquiring authority has engaged with affected parties prior to submitting the Order (for confirmation or making) and proposes to do so leading up to the implementation of the powers. Due to the varied nature of the different types of Orders that contain compulsory purchase powers and the different types of engagement/consultation recommended or required before an Order is made or sought it is not suggested that there should be a rigid procedure as to how that engagement is sought. In some cases detailed engagement may be required to understand complex business requirements, in other cases impacts may have been notified and made clear to acquiring authorities through existing required public consultation.

This document would:

- a. Outline the impacts/concerns established through early engagement with affected parties.
- b. At the point of application the document would show efforts the acquiring authority has made to understand the proposed impact of their proposals. Desktop research and an acquiring authority's guess at proposed impact would be insufficient (unless the acquiring authority has tried to engage on the issue of impact with an affected party and failed to get responses, in which case an acquiring authority should assess what they believe the impact would be based on the information they hold).
- c. Outline what proposals the acquiring authority has already or will commit to in the future to address those established impacts/concerns insofar as they regard it appropriate for them to do so. Those proposals will then often come down to the heart of whether the public interest to authorise the proposed development outweighs the private interest. Those proposals may include:
 - The form and content of the provisions contained in the proposed Order including the protective provisions.
 - Unilateral non-statutory commitments given by the acquiring authority (e.g. policies).
 - Specific commitments given to individual interests where a particular hardship would arise through the implementation of the usual statutory procedures or rules.

3.5 It is recognised that for some types of Orders an assessment of impact may involve a duplication of material already contained in other documents that are required to be submitted as part of the Order, however the CPA believes the discipline of specifically setting out the impact of the compulsory purchase of required interests in a single document together with proposals to mitigate those impacts would focus the minds of acquiring authorities on those issues from the outset.

Guidance

3.6 As to the amendment of the Guidance it should be amended so there is:

- a. Recognition that attempts at acquisition in advance should be to what is appropriate in the circumstances taking into account the size of the scheme, the nature of the interests to be acquired and the type of Order sought. Examples can be provided of circumstances where it would be appropriate to make such efforts (e.g. small CPOs

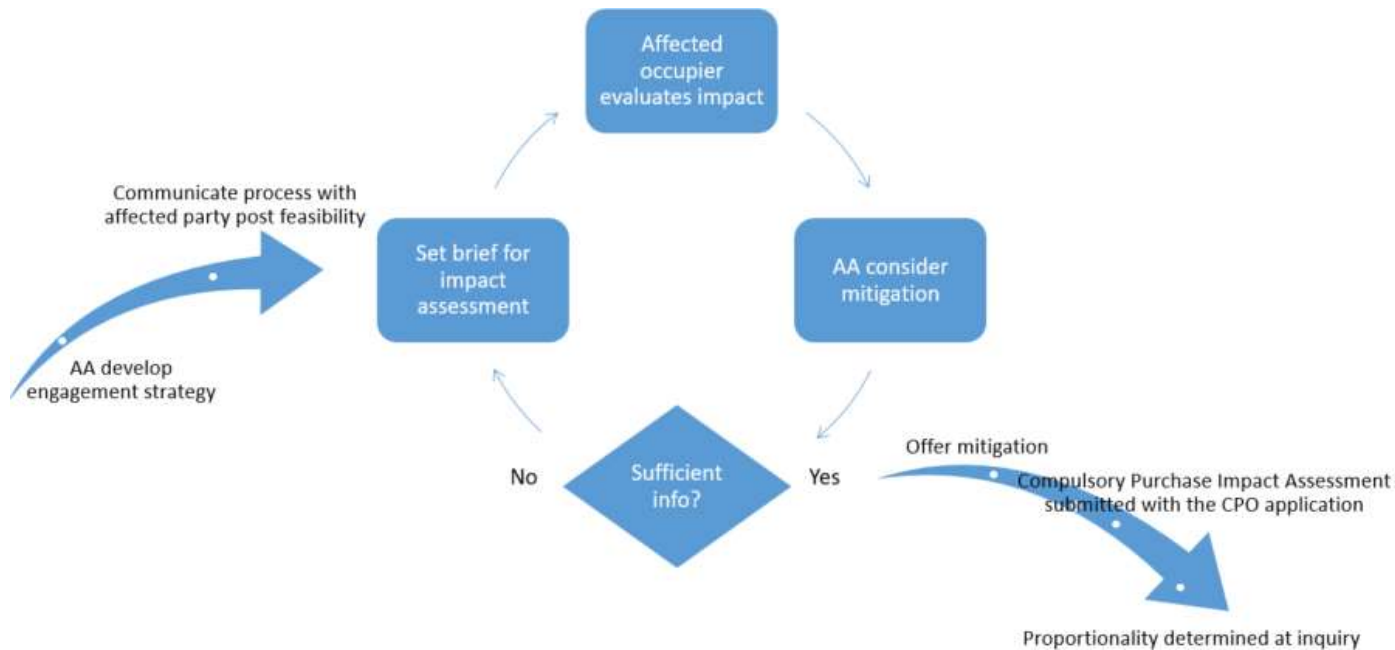
with a limited number of interests to be acquired) and situations where it may not be as appropriate (e.g. short term lessees, larger schemes where an Order will be sought in any event regardless of whether interests are acquired in advance).

- b. Additional limb requiring acquiring authorities to engage with affected parties in advance of the Order or an application for an order being made to understand the impacts of their proposals on the affected parties.
- c. In certain cases it may be appropriate for the acquiring authority to fund some work to understand the implications on the affected party. An acquiring authority should be prepared to do that in appropriate cases to ensure that the impact is properly understood at the point the application is made and accordingly the proposals around mitigation are properly developed in the application documents.
- d. There is a requirement for a Compulsory Purchase Impact Assessment to be submitted by an acquiring authority as part of its application documents and guidance provided as to its expected contents. It is recognised that it may be necessary for guidance across all forms of Orders to be updated as well as procedural regulations to make this a required document to be submitted as part of the application documents.

3.7 It is also recognised that Early Independent Valuations (EIV) has a complimentary role to play in respect of mitigating concerns relating to assessment the market value of land to be acquired. If Guidance is amended to put the emphasis on mitigating impact rather than acquisition then EIV has a key role to play as one of a range of measures which could mitigate impact of acquisition; others being, not before notice dates, option agreements or early unconditional purchase.

3.8 It is important that the changes set out above are not an additional layer of burden on acquiring authorities as this will only serve to delay the process of seeking Orders. Instead it should be regarded as a re-balancing by rewording the guidance away from attempts at acquisition in all cases to a move to understand impact and properly address that as part of the proposals for the Order. The CPA believes that this will improve the quality of applications made for Orders, provide a better framework for early engagement and provide a better baseline early in considering an application for an Order on the test of proportionality in considering whether compulsory purchase powers should be granted.

3.9 There may be a role for the CPA to play in providing best practice examples of early engagement to assist in understanding the requirements under amended Guidance.



5.0 Conclusion

5.1 There is currently significant political will to accelerate and use the compulsory purchase process in order to deliver more housing and infrastructure. With the proposed reforms set out above there is also an opportunity to make the process simpler, fairer, quicker and more cost effective without requiring primary legislation. This proposal will require changes to the Guidance and possibly also changes to secondary legislation to make the provision of a Compulsory Purchase Impact Assessment a required document across Orders.

5.2 The changes to the Guidance proposed should ensure the acquiring authority's team are focussed on meaningful engagement. An earlier understanding of the impact on occupier's lives can only be a positive thing in enabling informed decisions to be taken when mitigating the impact of acquisition.

5.3 From a claimant's perspective this can only lead to more collaborative and less adversarial relationships between the parties, which could save time and costs on both sides in the long run.

5.4 Cost impact of reform is always a material consideration. We believe that such a collaborative approach will not increase the overall cost for acquiring authorities but simply refocus existing efforts on early acquisition to include a focus on understanding impact and addressing mitigation. Whilst it will bring some elements of engagement forward it also offers a significant opportunity to reduce the disturbance compensation payable through mitigation of loss as well as more informed assessment leading to improved cost forecasting early in the project life.