Members English Reform Engagement Briefing

Via Zoom

Thursday 29th April 2021

Timings: Registration: 12.30, Start: 12.35; Close: 14.30

http://www.compulsorypurchaseassociation.org/the-cpa-s-reform-engagement-briefing.html

Programme – 2 hr

12.30	**Registration**
12.35	**Welcome** Richard Asher, Chair, Compulsory Purchase Association
12.40	**Early Independent Valuations** – click here for the paper Jon Stott • 10 mins Introduction, what is being proposed, justification • 15 mins of Q&A
13.05	**Early Engagements** – click here for the paper Adrian Maher • 10 mins Introduction, what is being proposed, justification • 15 mins of Q&A
13.30 25 mins	**Compensation Assessments and The Red Book** – click here for the paper Keith Petrie • 10 mins Introduction, what is being proposed, justification • 15 mins of Q&A
13.55	**Temporary Possession** – click here for the paper Vicky Fowler • 10 mins Intro • 15 mins Q&A
14.15	**Other issues to report upon** **s10a** – Richard Asher - click here **Loss payments** – Richard Asher - click here **Negative equity** – Richard Asher – click here **Interest Rates** - Richard Asher – click here **Stamp Duty** - Richard Asher – click here
14.30	**Close**

Compulsory Purchase Association
4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

Executive summaries of papers

Early Independent Valuations

Where promoters or acquiring authorities fail to make a robust and fair compensation offer at an early stage, it can lead to division and conflict that ultimately costs more to resolve and sometimes only by way of a UT decision, which adds further costs, stress and delay. Could a system of Early Independent Valuations lead to faster, fairer outcomes for claimants and acquiring authorities alike?

Experience has shown that the CPO process works more effectively when acquiring authorities are willing and able to take a proactive approach to early engagement and early acquisitions, and when affected parties are provided with increased certainty at an earlier stage.

In 2016 a CPA paper on early engagement 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'.*

Subsequently the CPA identified early independent valuations ('EIVs') as a specific means of overcoming some of the problems that had been identified, by providing greater certainty as to Rule 2 market value compensation at an earlier stage in the process.

The proposals have been refined and consulted on since 2016, and in 2019 the National Infrastructure Assessment ('NIA') included a recommendation that Government should '*provide greater certainty in compulsory purchase compensation negotiations by including independent valuations early in the process to be paid for by the acquiring authority by 2021'.*

Last November, in its response to the NIA, the Government confirmed its support for the intent of the recommendation, stating:

The government agrees that independent valuations, carried out at an early stage in the acquisition process, may help engender trust between parties and set more realistic expectations as to the amount of compensation owed. This would ultimately enable claims to be settled more swiftly.

Further consideration will need to be given to the potential costs and benefits of this proposal and how it might be implemented in practice. The government intends to publish proposals in the new year for consultation, including potential further reforms to the land compensation regime so it is fairer and easier to reach agreement.

The CPA welcomes the Government's position and we have subsequently further refined our proposals for how EIVs could work in practice, having had regard to feedback received through previous consultation processes.

The fundamental points about how we envisage EIVs working are as follows, as explained in further detail in the accompanying paper.

1. CPO is made or the TWAO or DCO is applied for;
2. Affected party requests an EIV in relation to the market value of their interest (subject to the market value being based on existing use value, the party having an interest of at least 5 years' remaining and the interest having an estimated value of over £20,000)
3. The parties agree who to appoint or ask the RICS to appoint an independent valuer if they are unable to agree;
4. The parties provide instructions to the independent valuer and all relevant information including (if they wish) their own evidence (to be limited in length, noting that the process is intended to be streamlined);
5. EIV is undertaken and the acquiring authority pays the associated fee;
6. Following an advance payment request the acquiring authority is obliged to pay 90% of the EIV figure on the date that the advance payment is due.

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

Changing behaviours through constructive engagement - Rule 6 Disturbance Compensation

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?

Government Guidance 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*[1] *but only to* "*consider*"[2] steps to help those occupiers affected by a CPO. This focus on acquiring all land is driving the wrong behaviours between acquiring authorities and occupiers in the period leading to public inquiries. Many occupiers are not interested in selling but want to object in principle or have agreements regarding the impact on their occupation and relocation.

Compulsory purchase is intended as a last resort because the use of CPO needs to be proportionate to the impact on the rights of individuals under the European Convention of Human Rights. The CPA believes that this test of "proportionality" should not be measured by attempts to purchase land by agreement but equal weight given to the overall impact of the scheme on the individual. Such impact can be mitigated by acquisition or in many other ways such as notice periods, commitments on timing, underwriting certain costs etc.

The CPA believes that the focus in Guidance should be changed to ensure acquiring authorities have engaged with affected parties, understood the impact on them and where practicable address those issues. 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 to focus more on proposals to mitigate assessed impact than attempts at acquisition in all cases. Such reform should address payment of claimants reasonable fees in such engagement

Understanding the impacts of the promoter's proposals on the affected parties will benefit both sides. It will facilitated evidence based decision making by acquiring authorities, improve their budget estimating and enable them to take steps to mitigate the claimants loss and thereby avoid wasted compensation. The affected party will better understand the impact and be engaging in meaningful discussion on how the impact can be reduced. We believe this will speed up the CPO consents process and not increase the overall cost to acquiring authorities.

[1] Paragraph 2 of "*Compulsory Purchase Guidance and Crichel Down Rules*" ("**Guidance**"),

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

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Compensation Assessments and The Red Book

This presentation deals with the relationship between the contents of the current RICS Red Book and the existing Compensation Code and how it can be more clearly interpretated.

Since 1974, RICS has heavily controlled and regulated the valuation of property assets. This is undertaken by way of the RICS Valuation- Global Standards (The Red Book). Much of the contents of The Red Book is mandatory for RICS members to follow.

The Red Book contains RICS UK VPGA 16 (non-mandatory)- which deals with valuations for statutory financial compensation claims. But compensation claims are governed by the "Compensation Code" i.e. relevant legislation and associated case law. How does the assessment of compensation claims (which involves the valuation of property assets) sit relative to The Red Book?

Accordingly, there is a need for RICS Valuers to have clarity on the relationship between these two (competing) standards. The CPA paper sets out both the principles and practicalities of compensation assessments and their relationship with The Red Book and, following the adoption of the paper by the CPA Board in autumn 2020, meaningful discussions have taken place with RICS which has resulted in RICS being prepared to incorporate many aspects of our paper within the next edition of The Red Book (scheduled for January 2022) as well as a revised version of its April 2017 Professional Statement (scheduled for Spring 2022).

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Temporary Possession

The Neighbourhood Planning Act 2017 ("NPA 2017") temporary possession provisions have still not come into force and the government has not published proposals for the regulations which must be made under the NPA 2017. The CPA intend to make recommendations on what regulations should be made and this presentation and paper explains what is proposed.

In summary, the CPA encourage Government to progress towards giving force to the provisions of the NPA 2017. Whilst those promoting NSIPs may feel that there is no need for the TP provisions to come into force, they will be of significance to those promoting, for example, Highways Act Compulsory purchase orders and regeneration schemes under the Town and Country Planning Act 1990 or similar legislation.

Discussions amongst the CPA Board, the CPA temporary possession working group and consultation among members have suggested that light touch regulation of the temporary possession powers in the NPA 2017 would be appropriate. The CPA will be recommending that the Regulations should:

- enable Orders under the Pipe-lines Act 1962 or Gas Act 1965 to include tailored temporary possession provisions similar to those that will be available to other similar bespoke consenting regimes;
- provide that protection for Special categories of land should apply for temporary powers, subject to the exceptions akin to those in the Planning Act 2008. Further guidance would, however, be helpful as to what would amount to serious detriment;
- permit a separate authorising instrument for temporary possession alone, provided that those who are affected have the same rights to be consulted, to comment or object and to be heard, as would be available under a standard compulsory purchase order;
- not address issues such as how break clauses and rent review provisions under leases should be dealt with where temporary possession powers are exercised. It is tempting to provide further direction / clarification on tenancy provisions. However this would create further complication and risk unintended consequences. Guidance should however deal with how the acquiring authority should assist in such matters and agree be-spoke, pragmatic solutions. The compensation provisions of 'any loss or damage' should suffice;
- prescribe that the notice of intended entry sets out details of the works and proposed timescales. If the acquiring authority is proposing anything other than full reinstatement post temporary possession the notice should also indicate that fact and invite the owner's agreement to the same;
- provide that permanent acquisition should always be discretionary but "need to sell/hardship schemes" like those offered by HS2 could apply during the period of temporary possession with acquiring authorities being expected (through guidance) to have such schemes and those schemes forming part of the consideration when the appropriateness of the temporary possession powers are considered by the examining authority or inspector;
- include a presumption that the land will be fully restored to its pre-works state unless the owner of the land agrees otherwise or that part of the land which cannot be reinstated (due to permanent works or apparatus) should be expected to be acquired permanently.
- TP powers should not be permissible without the agreement of the landowner where the nature of the land is to be fundamentally changed and the land cannot be reinstated

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S10A of the Land Compensation Act 1961 is not fit for purpose.

Section 10A (in respect of Expenses of owners not in occupation) in its current form the provision is not fit for purpose and creates a number of complications. The CPA is considering whether the government should repeal or amend the provision.

The intention of the current provision is to allow the re-imbursement of the costs an investor incurs in securing a replacement investment for one acquired under compulsory purchase powers.

However, the investor has to secure a replacement property within one year of the date of acquisition of the originally owned interest which is acquired.

In a number of circumstances, this timescale is not adequate and prevents the claimant from securing the appropriate re-imbursement of costs. These circumstances include where a full compensation payment has not been paid to the claimant within one year of the date of acquisition and therefore the claimant does not have the funds available to reinvest within the specified timescale.

The question to be considered is whether the existing legislation should be amended, and if so what amendments are required, or whether reliance can be placed on Rule 6 (s5) of the Land Compensation Act 1961 to address the claim and s10A be repealed.

Reversing loss payments

Investors have long benefitted from more generous statutory loss payments than those enjoyed by homeowners. Is this fair, or should the prescribed percentages and caps currently awarded be reversed so as to be more generous in favour of those who actually occupy their properties as homes?

The current Basic and Occupiers Loss payments are designed to reflect some of the inconvenience and upheaval that is caused by compulsory purchase but is not reflected in the disturbance compensation payable by virtue of s.5(1) of the 1961 Act. The CPA are concerned the payments are poorly targeted and should be adjusted to provide more compensation to occupiers, and less to investors. This would reflect the relative level of disruption and inconvenience caused to each group. By calculating the Loss payments with regard to the total compensation and reversing the current percentages, we believe that the necessary adjustment can be made without undue additional expense to acquiring authorities.

Two examples of common circumstances are shown in Appendix 1. Loss payments are calculated for each under the existing system, and under two potential alternatives. Our preferred proposal, A, gives an end result very close to the existing system. Proposal B takes only the change of percentages and retains the existing use of the s.5(2) value. This results in a significant under payment of compensation compared to the current rules.

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Negative equity and Compulsory Purchase- an update

The Council of Mortgage Lenders (now UK Finance) were brought to the table by MHT to find solutions for occupiers and owners trapped in scenarios where compulsory acquisition would crystallise negative equity and prevent relocation. For 2 years, nothing has moved forward, yet the problem remains. Is it now time for HMT to legislate?

Negative equity arises where an owner takes out a mortgage and the capital value of the property falls below the loan. When such a property is compulsorily purchased the acquiring authority pay the market value and the lenders have their usual remedies for defaulted loans. The problem is that losses are crystallised by the compulsory acquisition on loans which could otherwise have been serviced. This does not happen often but when it does the human impact is stressful at best or at worst tragic.

In 2015 the Government undertook consultation and recommended a voluntary code for transferring (called "porting") existing mortgage to alternative property. If the code was not agreed the government said it would legislate. In 2016, HMT and DCLG led the discussions with the Council of Mortgage Lenders. A draft Code was largely agreed. However CML would only recommend its members "considered" porting and would not recommend its members *use all reasonable endeavours to port the mortgage* once it had jumped over the hurdles of lenders new lending criteria. HMT said this had no teeth and was unacceptable. Changes in personnel then ensued and no progress has since been made.

CML's responsibilities have now passed to UK Finance and CPA met their representative last year. The CPA board has recently resolved press Government to legislate porting of mortgages in negative equity if UK Finance either

- refuse to recommend their members should port the mortgage once their criteria are met; or
- do not actively look to conclude the Voluntary Code.

Interest Rates

Consideration of Compulsory Purchase Interest Rates Consultation

I write on behalf of the Compulsory Purchase Association ('CPA') to follow up the Government's response to the Compulsory Purchase Interest Rates Consultation issued in May 2018, which closed in June 2018.

The CPA responded to this consultation and are very interested to understand when the Government intends to publish a response to this consultation and introduce an appropriate interest rate which would apply to both settlement of compensation generally and late payment of advanced payments.

As the Government's own consultation acknowledged, the current rate of interest at 0.5% below the Bank of England Base rate, results in no interest being payable and *creates "little financial incentive for acquiring authorities to settle compensation promptly"* and furthermore that compensation *"diminishes in real terms*".

The CPA's membership sees the hardship that this causes to many claimants on a day to day basis. They rarely come across claimants who are in *"the financial position to forego compensation for a prolonged period without this having a material impact on their business or livelihood"*.

Practitioners acting for both claimants and acquiring authorities want to see this change effected, to ensure interest is paid on both Advanced Payments and Compensation. It is considered essential in order to improve the system, incentivise acquiring authorities to settle claims more promptly and make the system fairer and faster for all. The continued failure to deliver this change due to concerns about gaming of CPO compensation by an extreme minority, if at all, is causing hardship to the vast majority of claimants.

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Furthermore parliamentary sanction has already been given to the introduction of a penal compensation rate for late advanced payments in s196(3) of the Housing and Planning Act 2016 and subsequent government consultation confirmed that a penal rate 8% above the BoE base rate would be taken forwards. This can obviously be avoided by acquiring authorities by paying advanced payments on time, in circumstances where they are in control of the level of these payments i.e. being based upon 90% of their own assessment of compensation and not dependent upon agreement with the claimant. Similarly in respect of settlement of compensation the Government has already indicated that it intends to introduce an interest rate of 2% above the BoE base. In the circumstances we do not understand the reasons why the implementation of the interest rates has been delayed for well over a year beyond the close of the last consultation.

Accordingly the CPA would be most grateful for an update from Government as to when they intend to publish their response to this latest consultation and move forwards with the introduction of interest payments.

Stamp Duty Land Tax – reform of section 60 of the Finance Act 2003

Only one exemption applies for SDLT in the context of compulsory purchase. That exemption does not fit well with guidance on the advance acquisition of affected interests.

Executive Summary

1. That the current SDLT exemption under section 60 should apply to acquisitions made in the shadow of compulsory purchase not just once a Compulsory Purchase Order is made.

Section 60 Finance Act 2003

2. Section 60 was introduced to avoid a double charge in taxation where a Council acquired a property through a Compulsory Purchase Order facilitating development and then transferred the property to a third party developer.
3. It applies where the person has made a Compulsory Purchase Order facilitating development by another person and applies whether the purchase was effected through implementation of the compulsory purchase or by agreement.

Issue

4. The exemption only applies when the Compulsory Purchase Order is made. In some cases this could discourage advance acquisition of property as required by government guidance although where the developer has already been brought on board then the acquisition could be direct to the developer avoiding a double charge.

Solution

5. It would be better for the exemption for such purchases to apply additionally in the shadow of compulsory purchase powers. This could be phrased in a similar way to how an acquiring authority is defined in section 172 of the Neighbourhood Planning Act 2016 or how an authority could compulsorily land in the context of overriding interests under section 203 of the same Act.

More generally

6. Is it right that land acquired for public sector sponsored projects should be subject to SDLT? It means additional funding has to be found for those costs. It does recirculate into the general public funds, but the relevant acquiring authority will not be able to recover that cost.

7. Under revised SDLT rules those SDLT costs can be significant.

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Individual Papers

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Changing behaviours through constructive engagement - a reform of CPO Guidance

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 July 2020 the CPA presented a paper to the Virtual Stakeholders' Forum on "Reform of CPO Law and Practice". The public benefit from the use of compulsory purchase powers must be proportionate to the impact on affected parties. The CPA believes the way this is expressed in "*Compulsory Purchase Guidance and Crichel Down Rules*" ("**Guidance**"), is driving the wrong behaviours in engagement between the acquiring authorities and affected parties. Guidance currently focusses on acquiring property instead of understanding the impact on affected parties and mitigating it where practicable. Acquisition is just one of the tools available to demonstrate proportionality. If there was effective early engagement with affected parties to understand the impact, then the cost benefit could be quantified and mitigated where practicable. This would benefit both acquiring authorities and the affected parties. Mitigation reduces losses thereby reducing compensation, it will reduce objections, and engagement on relevant issues will lead to better relationships between the parties.

1.2 The response to the CPA's paper was generally supportive but there were concerns as to how it could be implemented effectively without creating a bureaucracy. The CPA formed a working group to develop the proposal with legal experts, surveyors and a representative of CAAV. There are now 3 key recommendations for amending government Guidance;

(i) *In all cases where an acquiring authority seeks to use compulsory purchase powers, the acquiring authority should ensure that it has understood the impact of compulsory purchase on affected parties and whether and how that impact can be mitigated either through the existing statutory compulsory purchase process or compensation regime or, where appropriate, further mitigation is put in place*.

(ii) *The statement of reasons for a Compulsory Purchase Order ("**CPO**") should include an **Assessment of the Impact (AoI) of the compulsory purchase on affected parties** and if any mitigations are proposed, a description of the mitigations and their expected effect. This is in addition to the current requirement for it to include the steps the authority has taken to negotiate for the acquisition of the land by agreement*

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(iii) Change the emphasis throughout the Guidance from acquiring property as the main means of demonstrating the proportional use of compulsory purchase powers to instead be one of the means. Many affected parties are not interested in selling their land as described below. Appendix 1 sets out the proposed changes to the Guidance in full.

1.3 These proposals are initially proposed to apply to CPOs. However, the test of proportionality embodied within the European Convention on Human Rights ("ECHR") applies to all compulsory acquisition. The effect of acquisition on affected parties is identical irrespective of the route used to dispossess them of their land. There is therefore a case for extending the proposals in this paper to Development Consent Orders ("**DCO**") and Transport and Works Act Orders ("**TWAO**"). Indeed, there are material gaps in TWAO and DCO guidance in relation to engagement, and practitioners would benefit from the clarity of a single common regime set out in Guidance.

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 Government Guidance dictates the process for engagement in relation to Compulsory Purchase Orders and states that "*compulsory purchase is intended as a last resort*" and expects acquiring authorities "*to demonstrate that they have taken reasonable steps to acquire <u>all of the land</u> and rights included in the Order by agreement"*[3]. 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.

[3] Paragraph 2 of the Guidance

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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 TWAOs and DCOs 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 an application is submitted.

d. Guidance 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:

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 application for an Order is made and sometimes not until after the Order is confirmed. Whilst some fees may be paid by acquiring authority 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*

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that they have taken reasonable steps to acquire <u>all of the land</u> … 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 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 the programme 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"[4] steps to help those affected by a compulsory purchase order. Contrast this with a requirement in the Guidance to acquire all land. It is not surprising that 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.

3.0 Implementation of the proposed amended Guidance

3.1 <u>What is the format of the *Assessment of the Impact of the compulsory purchase on affected parties?*</u>

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

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The working group have deliberated as to whether the Guidance should be prescriptive as to the format of the AoI in the Statement of Reasons. It has decided against this due to the varied nature of the impacts. Although the amended Guidance requires engagement with all affected parties, we expect that the AoI will be a summary of the impacts having regard to the mitigation proposed (if any)

3.2 How is the requirement to engage enforced?

The current processes will apply and therefore ultimately the test of proportionality will be addressed in the inspector's report to the Secretary of State. The acquiring authority would be required by Guidance to engage with all affected parties and would not know who would object and appear at the inquiry. If an objector flagged the inadequacy of engagement with them then this could be addressed in the acquiring authority's evidence both specifically and / or generically. Earlier consultation on these proposals has flagged the need to avoid a "bureaucratic cottage industry" and we believe the above mechanism addresses this.

3.3 What level of engagement is expected?

The Statement of Reasons would show the efforts the acquiring authority has made to understand the proposed impact of their proposals at the point of application. Desktop research and an acquiring authority's guess at the proposed impact would be insufficient engagement to understand the impact of compulsory purchase (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).

3.4 What mitigation should the AoI address?

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 or which may already exist through the existing compulsory purchase process or compensation regimes. 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.

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3.5 Should the acquiring authority pay the claimant's reasonable fees?

Under current legislation there is no obligation for the acquiring authority to pay any fees prior to the exercise of powers. Guidance says[5] acquiring authorities should "[where appropriate] *give consideration to funding landowners' reasonable costs of negotiation or other costs and expenses likely to be incurred in advance of the process of acquisition*". It is unreasonable to expect the affected party to incur costs in engaging with an acquiring authority about their scheme. As a minimum, the Guidance recommends paying the reasonable professional fees in responding to an acquiring authority's request for meetings, information and requests to develop the mitigation proposals. As at present, there should be no expectation of recovering fees relating to unsolicited activities or for funding an objection.

3.6 Will this increase the administrative burden of an acquiring authority?

The CPA does not believe this will increase the administrative burden of an acquiring authority for three key reasons:

- The proposals aim to change the emphasis of engagement in relation to compulsory purchase powers prior to the making of an Order. It is already necessary to engage with affected parties through seeking acquisition prior making an Order and in many cases through appropriate consultation.
- Acquiring authorities are already required to provide a summary of their efforts to acquire property by agreement in the Statement of Reasons. In some regimes where compulsory purchase powers are sought there is also already a requirement for a report summarising consultation. This requirement would ask for the acquiring authority to link their understanding of impact on affected parties, arising from their engagement and consultation, to the proposed Order and any related policies.
- Acquiring authorities are not being asked to produce a new additional document on submission of a request to confirm a CPO. In addition, the CPA believes the proposal in relation to TWAOs and DCOs could likewise be incorporated into the existing application documents.

3.7 It is also recognised that Early Independent Valuations (EIV) have a complementary role to play in respect of mitigating concerns relating to the assessment of the market value of land to be acquired. If the

[5] Para 19 of the Guidance

Compulsory Purchase Association
4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

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 the impact of acquisition; others being "not before" notice dates, option agreements or early unconditional purchase. The Guidance is therefore proposed to be amended to say[6] that the acquiring authority should "*consider offering independent valuations as a means of assessing market value*".

4.0 Conclusion

4.1 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. It is believed the changes could be implemented through the inclusion of changes to the Guidance and the required contents of the Statement of Reasons.

4.2 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 occupiers' lives can only be a positive thing in enabling informed decisions to be taken on mitigating the impact of acquisition.

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

4.4 The 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 in some cases it may 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.

[6] Para 19 of the Guidance

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4.5 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 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.

4.6 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 use of compulsory purchase powers.

Extracts of Government's CPO Guidance relevant to (i) Attempts to Negotiation and (ii) Confirmation Tests

Chapter 1 – Para 2

2. When should compulsory purchase powers be used?

Acquiring authorities should use compulsory purchase powers where it is expedient to do so. However, a compulsory purchase order should only be made where there is a compelling case in the public interest.

Use of compulsory purchase powers should be avoided where it is reasonably possible to do so. Accordingly the confirming authority will expect the acquiring authority to demonstrate that they have taken reasonable steps to:

- understand (including through direct engagement with the affected owners and occupiers) the impact of the compulsory purchase powers in the Order on affected owners and occupiers if exercised; and

- secure the land and rights included in the Order by agreement.

What reasonable steps are will depend on the circumstances. At one end of the spectrum an acquiring authority should not continue with attempts to engage if the affected party has made it clear that they do not wish to do so, however at the other end of the spectrum a single attempt to engage without response

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
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from the affected party is unlikely to be sufficient. An affected party may also be willing to engage on the impact of compulsory purchase powers but not on acquisition by agreement.

The confirming authority will further expect the acquiring authority to have considered whether mitigation will be in place against the identified impacts. This may be through mitigation already built into the existing compulsory purchase process and compensation regimes or through specific mitigations put in place for the Order to deal with identified issues. Identifying impacts early and considering possible mitigations may assist in discussions with affected owners that may mean agreement on the acquisition of land and rights required is reached avoiding the need for the use of compulsory purchase powers or that the number of objections to the Order received is minimised.

Where acquiring authorities do secure any land and rights by agreement, they will normally pay compensation as if it had been compulsorily purchased.

An acquiring authority does not need to wait for discussions with affected parties to break down or for the affected parties to begin to engage before starting the compulsory purchase process. Delaying starting the compulsory purchase process can mean valuable time in bringing forward development is lost. Therefore, depending on when the land and rights are required, it may often be sensible, given the amount of time required to complete the compulsory purchase process, for the acquiring authority to:

- plan a compulsory purchase timetable as a contingency measure; and
- initiate formal procedures

This will also help to make the seriousness of the authority's intentions clear from the outset, which in turn might encourage those whose land is affected to enter more readily into meaningful negotiations.

When making and confirming an order, acquiring authorities and authorising authorities should be sure that the purposes for which the compulsory purchase order is made justify interfering with the human rights of those with an interest in the land affected. The officers' report seeking authorisation for the compulsory purchase order should address human rights issues. Further guidance on human rights issues can be found on the Equality and Human Rights Commission's website.

Chapter 2 – Justifying a Compulsory Purchase Order

Para 12

12.How does an acquiring authority justify a compulsory purchase order?

A compulsory purchase order should only be made where there is a compelling case in the public interest. An acquiring authority should be sure that the purposes for which the compulsory purchase order is made justify interfering with the human rights of those with an interest in the land affected. Particular consideration should be given to the provisions of Article 1 of the First Protocol to the European Convention

Compulsory Purchase Association
4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
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on Human Rights and, in the case of a dwelling, Article 8 of the Convention. Consideration should also be given to the public sector equality duty.

Para 13

How will the confirming minister consider the acquiring authority's justification for a compulsory purchase order?

The minister confirming the order has to be able to take a balanced view between the intentions of the acquiring authority and the concerns of those with an interest in the land that it is proposing to acquire compulsorily and the wider public interest. The more comprehensive the justification which the acquiring authority can present, the stronger its case is likely to be.

However, the confirming minister will consider each case on its own merits and this guidance is not intended to imply that the confirming minister will require any particular degree of justification for any specific order. It is not essential to show that land is required immediately to secure the purpose for which it is to be acquired, but a confirming minister will need to understand, and the acquiring authority must be able to demonstrate, that there are sufficiently compelling reasons for the powers to be sought at this time.

Regard will be had to any mitigation offered by the acquiring authority when judging the impact of the scheme on the private rights of the affected parties.

Chapter 3 –

Para 17.

What are the benefits of undertaking discussions prior to and in parallel with preparing and making a compulsory purchase order?

Undertaking discussions with affected parties prior to and in parallel with preparing and making a compulsory purchase order can help to build a good working relationship with those whose interests are affected by showing that the authority is willing to be open and to treat their concerns with respect. This includes statutory undertakers and similar bodies as well as private individuals and businesses. Talking to affected parties will assist the acquiring authority to understand more about the land and rights it is seeking to acquire, its impacts on the owners and occupiers, the cost of compensating owners and occupiers, and any physical or legal impediments to development that may exist. Such discussions can then help to save time at the formal objection stage by minimising misunderstandings and limiting objections by identifying where mitigation to minimise impacts on owners, occupiers and affected parties can be put in place.

Para 18.

Can alternative dispute resolution techniques be used to address concerns about a compulsory purchase order?

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

In the interests of speed and fostering good will, acquiring authorities are urged to consider offering those with concerns about a compulsory purchase order full access to alternative dispute resolution techniques. These should involve a suitably qualified independent third party and should be available wherever appropriate throughout the whole of the compulsory purchase process, from the planning and preparation stage to agreeing the compensation payable for the acquired properties.

The use of alternative dispute resolution techniques can save time and money for both parties, while its relative speed and informality may also help to reduce the stress which the process inevitably places on those whose properties are affected. For example, mediation might help to clarify concerns relating to the principle of compulsorily acquiring the land, while other techniques such as early neutral evaluation might help to relieve worries at an early stage about the potential level of compensation eventually payable if the order were to be confirmed.

Para19.

What other steps should be considered to help those affected by a compulsory purchase order?

Compulsory purchase proposals will inevitably lead to a period of uncertainty and anxiety for the owners and occupiers of the affected land. Acquiring authorities should therefore:

• provide full information from the outset about what the compulsory purchase process involves, the rights and duties of those affected and an indicative timetable of events; information should be in a format accessible to all those affected

• appoint a specified case manager during the preparatory stage to whom those with concerns about the proposed acquisition can have easy and direct access

• keep any delay to a minimum by completing the statutory process as quickly as possible and taking every care to ensure that the compulsory purchase order is made correctly and under the terms of the most appropriate enabling power

• consider offering to alleviate concerns about future compensation entitlement by entering into agreements about the minimum level of compensation which would be payable if the acquisition goes ahead (not excluding the claimant's future right to refer the matter to the Upper Tribunal (Lands Chamber))

• where appropriate offer advice and assistance to affected occupiers in respect of their relocation and provide details of available relocation properties where appropriate

• consider providing a 'not before' date, confirming that acquisition will not take place before a certain time

• where it may be necessary to seek specialist professional advice, or to undertake surveys or reports to assist in understanding the impact of acquisition on particular land, give consideration to funding such professional advice or the undertaking of such surveys or reports

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• fund owners' and occupiers' reasonable costs of negotiation or other incidental costs and expenses likely to be incurred in the process of an acquisition

• ensure that owners and occupiers are aware of professional advice available to assist them in understanding the impact of the scheme on their interest and appropriate compensation

• ensure that owners and occupiers are aware of guidance available on compulsory purchase including this guidance, the compulsory purchase booklets issued by MHCLG, the RICS Professional Statement on compulsory purchase and the CPA Land Compensation Pre-Reference Protocol

Section 12: preparing statement of reasons

196. What information should be included in the statement of reasons? The statement of reasons should include the following information:

(i) a brief description of the order land and its location, topographical features and present use

(ii) an explanation of the use of the particular enabling power

(iii) an outline of the authority's purpose in seeking to acquire the land

(iv) a statement of the authority's justification for compulsory purchase, with regard to Article 1 of the First Protocol to the European Convention on Human Rights, and Article 8 if appropriate

(v) a statement justifying the extent of the scheme to be disregarded for the purposes of assessing compensation in the 'no-scheme world'

(vi) a description of the proposals for the use or development of the land

(vii) a statement about the planning position of the order site. See also Section 1: advice on section 226 of the Town and Country Planning Act 1990 for planning orders.

(viii) information required in the light of government policy statements where orders are made in certain circumstances eg as stated in Section 5: local housing authorities for housing purposes where orders are made under the Housing Acts (including a statement as to unfitness where unfit buildings are being acquired under Part 9 of the Housing Act 1985)

(ix) any special considerations affecting the order site eg ancient monument, listed building, conservation area, special category land, consecrated land, renewal area, etc

(x) if the mining code has been included, reasons for doing so

(xi) details of how the acquiring authority seeks to overcome any obstacle or prior consent needed before the order scheme can be implemented e.g. the need for a waste management licence

(xii) details of any views which may have been expressed by a government department about the proposed development of the order site

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(xiii) (a) what steps the authority has taken to secure the acquisition of the land and rights required by agreement

(xiv) (a) a summary of the impact the compulsory purchase powers contained within the Order would have on the owners and occupiers of the land and rights affected if exercised (either generically and/or individually as appropriate) as the acquiring authority understands those impacts having engaged with such owners and occupiers on the potential impact; and (b) what mitigation (if any) will be in place to alleviate those impacts either through the existing compulsory purchase process or compensation regimes or through specific mitigation that the acquiring authority is proposing to put in place

(xv) a statement in relation to the acquiring authority's public sector equality duty and how that has been taken into account in making the Order

(xvi) any other information which would be of interest to persons affected by the order e.g. proposals for rehousing displaced residents or for relocation of businesses

(xvii) details of any related order, application or appeal which may require a coordinated decision by the confirming minister e.g. an order made under other powers, a planning appeal/application, road closure, listed building; and

(xviii) if, in the event of an inquiry, the authority would intend to refer to or put in evidence any documents, including maps and plans, it would be helpful if the authority could provide a list of such documents, or at least a notice to explain that documents may be inspected at a stated time and place

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

Early Independent Valuations

Where promoters or acquiring authorities fail to make a robust and fair compensation offer at an early stage, it can lead to division and conflict that ultimately costs more to resolve and sometimes only by way of a UT decision, which adds further costs, stress and delay. Could a system of Early Independent Valuations lead to faster, fairer outcomes for claimants and acquiring authorities alike?

1. Background

1.1 In advance of the 2016 Stakeholder meeting Adrian Maher authored a paper that discussed the increase of adversarial behaviours within the compulsory purchase sector. Adrian's paper considered that the culture is largely a consequence of a general reluctance on the part of acquiring authorities to engage early and effectively with affected parties, which is something that is allowed to happen because legislation does not require it.

1.2 Experience has shown that the process becomes less adversarial when acquiring authorities are willing and able to take a more proactive approach to early engagement and early acquisitions, whereas, unsurprisingly, the process becomes more adversarial where acquiring authorities are unable or unwilling to do so.

1.3 Government guidance recommends early engagement and states that acquiring authorities are required to demonstrate that they have *"taken reasonable steps to acquire all of the land by agreement",* but, as Adrian's paper referenced, that test is not applied consistently by all confirming authorities, and in many cases efforts to acquire by agreement are applied as a 'tick-box' exercise.

1.4 The 2016 paper concluded by stating: *'The CPA perceive that without radical change in behaviours the potentially huge increase in workload [that was envisaged at that time, particularly due to the demands that the High Speed 2 project would place on resource capacity across all professional disciplines] could threaten the credibility and acceptability of compulsory purchase'.*

1.5 Subsequent to the 2016 Stakeholder meeting the CPA identified early independent valuations ('EIVs') as a specific means of overcoming some of the problems that had been identified, by providing greater certainty as to Rule 2 market value. I presented the proposal to the Law Reform Lecture in 2017, prior to which pre-reading material was prepared to explain the problems and a number of proposed solutions.

Compulsory Purchase Association
4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

1.6 The presentation that I gave in 2017 included the following recommendations:

1. *An affected landowner (claimant) may require the acquiring authority to provide an assessment of market value at any time following the making of the Compulsory Purchase Order ('CPO') (or submission of Transport and Works Act Order ('TWAO') / Development Consent Order ('DCO') etc.).*
2. *If the claimant does not accept the acquiring authority's assessment they may require the acquiring authority to procure an independent market valuation to be undertaken by a Surveyor appointed by the RICS.*
3. *Following receipt of the independent valuation it will be for the acquiring authority to decide whether to make an offer that reflects the independent valuation, and it will be for the claimant to decide whether or not to accept the offer if it is made.*

- *An alternative to 3 could be that the AA is obliged to make an offer to acquire based on the independent valuation.*
- *Another option could be that the independent valuation sets the minimum amount to be paid by the acquiring authority whenever powers are exercised, thereby providing the claimant with certainty that they will not receive less than that amount.*

1.7 CPA members were consulted on the idea and the proposal was included as a recommendation within the National Infrastructure Commission's inaugural National Infrastructure Assessment ('NIA'), published in July 2018. The NIA's recommendation was that Government should *'Provide greater certainty in compulsory purchase compensation negotiations by including independent valuations early in the process to be paid for by the acquiring authority by 2021'.*

1.8 Following the publication of the NIA the CPA established a working group to focus on this issue. Some elements of the proposal evolved and a paper setting out the CPA's updated proposal was presented at a further Stakeholder meeting in March 2020.

1.9 The Government responded positively to the NIA's recommendation in November 2020, as follows:

Compulsory Purchase Association
4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

The government supports the overall intent of this recommendation. Where land is subject to compulsory purchase, negotiations over compensation can become entrenched. This may prolong the process, increasing costs for both acquiring authorities and claimants, particularly where claims need to be settled at the Upper Tribunal (Lands Chamber).

The government agrees that independent valuations, carried out at an early stage in the acquisition process, may help engender trust between parties and set more realistic expectations as to the amount of compensation owed. This would ultimately enable claims to be settled more swiftly.

Further consideration will need to be given to the potential costs and benefits of this proposal and how it might be implemented in practice. The government intends to publish proposals in the new year for consultation, including potential further reforms to the land compensation regime so it is fairer and easier to reach agreement

1.10 Having had regard to the comments provided at the Stakeholder meeting and the Government's response to the NIA the working group has made some changes to the proposal, with the intention of ensuring EIVs would work in a manner that engenders trust and increases certainty, whilst avoiding adding cost to the overall process.

1.11 A separate CPA working group is looking at how early engagement in the compulsory purchase process may be encouraged.

2. Introduction

2.1 The purpose of recommending the introduction of EIVs is to provide affected parties with greater certainty as to their likely Rule 2 market value compensation entitlement at an earlier stage in the process. We believe that enabling affected parties to have the market value of their interest assessed at an earlier stage by an independent party – reflecting what happens in the US and many other countries – will also help to reduce the likelihood of parties adopting entrenched positions and the associated risk of lengthy and costly litigation being necessary.

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
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2.2 It is hoped that the proposals included in this paper will be consulted on by the Ministry of Housing Communities and Local Government and will be subsequently adopted within primary legislation. We feel that a statutory requirement to offer EIVs is the most effective means of ensuring they are offered consistently across all CPOs, DCOs and TWAOs.

2.3 A summary of how we propose that the EIV process would work is provided at Appendix 1.

3. Scope of EIVs

3.1 We have considered the extent to which EIVs could be used, and discussed the following scenarios:

1 – To cover all elements of compensation (i.e. including disturbance compensation as well as market value);
2 – To cover market value consideration and injurious affection / severance;
3 – To cover all elements of market value compensation; or
3 – To cover market value compensation in limited circumstances.

3.2 We consider that it would be infeasible for EIVs to cover disturbance compensation because it is often simply not possible to foresee all of the elements of disturbance compensation that may be claimed at an early stage, and the extent of disturbance compensation will often be affected by the availability of replacement properties and the period of notice that is provided by an acquiring authority, both of which would be unknown at an early stage. Disturbance compensation is not considered any further in this paper.

3.3 We considered whether it would be feasible for EIVs to cover all elements of market value compensation, including cases where the value may be based on hope or development value, as well as cases where market value is based on existing use value.

3.4 We are of the opinion that, whilst it is feasible that EIVs could be used to cover such cases, for the purpose of establishing the principle and testing the effectiveness of EIVs it may be preferable to initially limit their application to cases where market value is based on existing use value.

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

3.5 We do not consider that short leasehold interests (i.e. from year to year or with less than (say) 5 years remaining) should be subject to EIVs prior to a CPO being confirmed on the basis that they are wasting assets and the value will quickly change.

3.6 We do not consider EIVs should be used in relation to interests that are estimated by the acquiring authority, acting reasonably, to be valued at less than £20,000

3.7 We do not consider it would be appropriate for EIVs to be used to assess injurious affection or severance compensation, on the basis that in many cases the extent of injurious affection or severance is not known until after the scheme has been built and is operational.

3.8 We also do not consider that, initially, EIVs should be used in the context of claims involving the application of planning assumptions, such as those based on development value or hope value. We consider this is something that should be kept under review and that EIVs could be used in the context of claims involving planning assumptions, in the future, subject to the assumptions having been agreed between the parties or otherwise determined.

4. Who would undertake EIVs?

4.1 We have considered whether any specific qualification or accreditation should be required in order for somebody to be able to be appointed as an Independent Valuer, and whether a pool of valuers would need to be created.

4.2 We concluded that, whilst it may be sensible or possibly necessary for the RICS to create a panel of valuers, in order to ensure public sector bodies are able to comply with procurement rules, there should be no reason why the parties should not decide between them who they wish to appoint, in much the same way as currently exists if a dispute is referred to expert determination or mediation, for example.

4.3 If the parties are unable to agree who to appoint they could ask the RICS to appoint somebone on their behalf (in the same way that parties may ask the RICS to appoint a mediator or independent expert).

4.4 In all cases it will be most critical that the Independent Valuer has local market knowledge and experience of valuing the type of property that is subject to the EIV.

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

4.5 It will of course also be necessary for the Independent Valuer to confirm compliance with the relevant mandatory requirements of the RICS Professional Statement for surveyors advising in relation to compulsory purchase and statutory compensation.

5. Instructions to be provided to the Independent Valuer

5.1 We have considered the extent of instructions that should be provided to Independent Valuers, noting that it is intended that they are capable of being undertaken relatively quickly.

5.2 We concluded that it would be beneficial if the instructions could be relatively simple, and be limited to specifying:

1. The interest to be valued; and
2. The inclusion of all necessary information concerning the interest to be able to provide a valuation.

5.3 We consider that the instructions should be issued by the acquiring authority and that a prescribed form or template should be used.

5.4 The valuation date for the purposes of the EIV would be the date the assessment is made.

5.5 We consider that it would be beneficial for the CPA to prepare a template brief as a reference point for Independent Valuers.

5.6 We also consider that:

1. The Independent Valuer should have access to legal advice if they so require (although it is not envisaged that this will generally be required if the scope is initially limited to existing use value cases).
2. The parties should be obliged to provide all necessary information to the Independent Valuer at the point of instruction (such as legal notices, title information, tenancy details etc).
3. The Independent Valuer should be provided with access to the subject property, in order to carry out an inspection.
4. The claimant should sign a declaration that they have provided all necessary information concerning the interest, and all relevant notices.

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

5. Both parties should have the opportunity to submit comparable evidence to support their view, as part of a short (word limited) statement of case / position statement, to be provided at the point of instruction (although as this process is intended to be as simple as possible, the parties should not be obliged to submit anything and a short deadline should be applied for submitting information).

6. Should an EIV be binding?

6.1 In order for EIVs to be meaningful we consider it important that they have some meaningful effect.

6.2 Depending on when EIVs are undertaken (see section 7) it is possible that there could be a considerable period of time between the EIV being undertaken and the date on which an interest is compulsorily acquired. As such, we consider that it is not appropriate for the EIVs to categorically fix the amount of market value compensation payable for an interest.

6.3 Instead, we consider it would be appropriate for EIVs to act as a 'not less than' figure for the purpose of the advance payment payable by the AA, whereby the AA should be committed to paying 90% of the EIV figure on the earliest date on which an advance payment would be payable in accordance with section 52 of the Land Compensation Act 1973.

6.4 That way, the EIV would have the effect of providing the affected party with certainty, without binding either party to it as the final figure to be paid for market value, which would remain to be assessed on the valuation date (i.e. usually the date of possession).

6.5 If the market value on the valuation date was assessed at being less than the amount paid (i.e. less than 90% of the EIV), the affected party would be entitled to retain the full amount it had received. It is acknowledged that if this were introduced in relation to EIVs it may have implications for other advance payments.

6.6 We consider that it is appropriate for EIVs to be on an open basis, whereby they could be referred to during the course of any subsequent dispute resolution process.

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

7. When should EIVs be undertaken?

7.1 We considered the following options for when EIVs should be capable of being requested:

1. Any time after a resolution to make a CPO is made;
2. Any time after a CPO is made or an application has been made for a DCO or TWAO or a Hybrid Bill has been laid before Parliament;
3. Any time after a CPO is confirmed, a DCO or TWAO made or a Hybrid Bill is enacted;
4. Any time after an acquisition notice has been served; or
5. Any time after possession has been taken.

7.2 In many regards it would be beneficial for affected parties to have the option to request an EIV from the earliest stage possible. However, it should be recognised that a) the earlier an EIV is undertaken the greater the period of time between the date of that valuation and the valuation date for assessing compensation under the Compensation Code (during which period there could be significant changes in market conditions and therefore values), and b) if an EIV is requested prior to a CPO being made there is a risk that the interest subject to the EIV may not be included within the CPO, whereby the time and cost involved in undertaking an EIV would potentially be abortive.

7.3 Taking those points into account and noting that we intend for EIVs is to bind acquiring authorities to a 'not less than' figure in relation to advance payments, we are of the view that, on balance, it would be appropriate for EIVs to be capable of being requested from the point at which a CPO is made / DCO or TWAO is submitted (i.e. from point 2 of the above bullet points), and the opportunity to request one should remain open until the date on which an advance payment is requested (other than in relation to leases with less than five years remaining, in which cases EIVs may only be requested after the CPO is confirmed).

7.4 In all cases, if an EIV is requested, we consider it should be mandatory for the acquiring authority to instruct that one be carried out.

7.5 We also consider it should be open for an acquiring authority to unilaterally instruct an EIV to be undertaken if it considers it appropriate to do so.

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
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7.6 We consider it would be appropriate for guidance to be produced which sets timeframes for both the instructions for EIVs being issued and for them to be undertaken.

8. Who should pay for the EIV?

8.1 We agree with the NIA that in all cases acquiring authorities should bear the cost of EIVs.

Appendix 1

Summary of the EIV process

1. CPO is made or the TWAO or DCO is applied for;
2. Affected party requests an EIV;
3. Parties agree who to appoint or ask the RICS to appoint if they are unable to agree;
4. Parties provide instructions to the independent valuer and all relevant information including (if they wish) their own evidence;
5. EIV is undertaken and the acquiring authority pays the associated fee;
6. Following an advance payment request the acquiring authority is obliged to pay 90% of the EIV figure on the date that the advance payment is due.

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Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

Compensation Assessments and The Red Book

This presentation deals with the relationship between the contents of the current RICS Red Book and the existing Compensation Code and how it can be more clearly interpretated.

CPA Proposed Revival Document
in respect of
RICS UK VPGA 16
Valuations for statutory financial compensation assessments

Application and Scope of The Red Book

1. The assessment of compensation claims where interests in real estate are compulsorily acquired is strictly controlled by legislation and case law, which varies within the four nations of the UK. Members must be aware of and follow the mandatory contents of the April 2017 RICS Professional Statement "Surveyors acting in respect of compulsory purchase and statutory compensation" which requires members to be able to demonstrate a proper understanding of the statutes, statutory instruments, case law and government guidance in respect of the compulsory purchase code when undertaking work relating to compulsory purchase instructions. For the avoidance of doubt, such property valuations are subject to the general requirements of PS1 and PS2.

2. Exceptions under section 5 of PS1 may apply to compulsory purchase work where, in particular, the valuation is an indication of the likely outcome of a negotiation. However, while the requirements of VPS1-5 inclusive are not mandatory in these circumstances, they nevertheless demonstrate good practice and should be followed, where appropriate. Members must also be aware that the requirements of the April 2017 Professional Statement remain mandatory and cover some areas also covered by VPS1-5 e.g. members to have prepared and to possess detailed signed-off terms of engagement so that all material matters have been adequately covered for all aspects of the advice and service to be provided. All valuations undertaken for statutory compensation assessment purposes e.g. open market valuations where either all or part of a property has been compulsorily acquired, Part 1 claims, granting of easements or wayleaves are subject to PS1 and PS2. Notwithstanding this, in most, if not all cases, assessment of compensation claims will involve negotiations between the parties which will be primarily based upon the valuations produced by both entities and may therefore be subject to the exception to VPS1-5.

Compulsory Purchase Association
4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

3. The circumstances in which members can be engaged in cases where a compulsory acquisition has already taken place or in advance of a compulsory purchase are varied. However, in essence, members are likely to be involved in either (a) have been commissioned by an Acquiring Authority (or a commercial partner of an Acquiring Authority) or working within the Acquiring Authority and providing valuation advice to a client service within the Acquiring Authority to assess and negotiate compensation claims on its behalf or (b) have been engaged by the person or entity whose interest in real estate is proposed to be or has already been compulsorily acquired and have been instructed to assess and negotiate the claim on behalf of the claimant.

4. Members involved in the assessment and negotiation of financial compensation claims must provide balanced professional advice to secure an equitable outcome consistent with the requirement to agree a fair and reasonable compensation claim settlement in accordance with the compulsory purchase code for a reasonable cost and within a reasonable timescale. Thus, the conduct of members is to act reasonably, competently and responsibly taking into account all relevant circumstances surrounding the proposed or actual acquisition. These principles are fully set out in the April 2017 RICS Professional Statement.

5. Notwithstanding the above, it is inevitable that sometimes disputes will occur either with regard to differences in legal interpretation and/or valuation matters. When this occurs, there is an established route by which resolution can be achieved- in England and Wales, the dispute is referred to the Lands Chamber of the Upper Tribunal, in Scotland to the Lands Tribunal for Scotland and in Northern Ireland to the Lands Tribunal for Northern Ireland. In such situations, the relevant RICS Professional Statements "Surveyors acting as expert witnesses" are applicable, the contents of which are mandatory for members to follow. Such disputes are often lengthy and potentially very costly for both parties and consideration is being given by RICS to establish suitable Alternative Dispute Resolution methods. Members who become involved in any ADR process must exercise care to ensure that the advice offered and service provided in such cases is in accordance with the contents of the relevant Practice Statements and The Red Book.

Valuation matters under or in anticipation of compulsory purchase

6. Compulsory purchase and compensation payments first came to the fore in the UK in the mid-19th century with the advent of the railway system. At around that time, consolidating legislation came into

Compulsory Purchase Association
4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

effect (replacing the need for individual compulsory purchase orders) some of which is still in use today but has been supplemented over the last 175 years with numerous Acts of Parliament enacted within the four nations of the UK and associated case law- to form what is known as the Compulsory Purchase and Compensation Code- and it is upon this Code that financial compensation claims are assessed and negotiated. The relevant statutory definition of value must be used in assessing the compensation and members should note that the VPS4 definition of Market Value is not fully compatible with the statutory definition for compulsory purchase, in particular with regard to a special purchaser. Members should therefore take care to ensure that the basis of value adopted is correct and clearly explained, even where the contents of VPS1-5 are not mandatory. Members must also be aware of applicable statutory and case law provisions disregarding the impact of the compulsory purchase and its underlying scheme and the assumptions that can be made regarding planning status and prospects as required by the April 2017 Professional Statement: these can be treated as Special Assumptions. Members are reminded that compensation assessments which include the value of property are regarded by RICS as valuations and that each nation within the UK has its own specific compulsory purchase and compensation legislation.

7. Compensation assessments have a fixed statutory date of valuation dependent upon the method used by an Acquiring Authority to compulsory purchase interests in real estate: such methods include Notice to Treat or a General Vesting Declaration. Up until there is a fixed date, then the valuation date is current (Blight Notices fall into this category). Accordingly, members must be aware of market conditions prevailing and the availability and analysis of comparable sales/letting evidence. Members must also take into account relevant statutory and case law assumptions and disregards relating to the impact of the compulsory purchase scheme.

8. A wide variety of properties and real estate interests are compulsorily acquired and, as a consequence, all of the recognised methods of property valuation require to be employed dependent upon the property type and interest being acquired. Thus, members need to be fully aware of the utilisation of these methods and when they should be used. However, it should be noted that a Rule 5 claim i.e. equivalent re-instatement is not a valuation for PS1-2 purposes. Further, detailed valuation skills are required when it is being contended that the property acquired has a value for development or re-development which is considerably higher than its existing use value. Such cases may require a range of other professionals e.g. planners, engineers, quantity surveyors either to support that contention or to

Compulsory Purchase Association
4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

refute that contention and, accordingly, members require to work within their areas of knowledge and competence.

9. In addition, the compensation claim may not just be limited to the open market value of the real estate interest acquired but may also include an element known as "disturbance" i.e. the costs and expenses arising from dispossession of an interest in land. In some cases, the amount of "disturbance" may involve the analysis of business performance; accordingly, a detailed knowledge and understanding of financial statements, notably profit and loss accounts, will be required, although many elements of a "disturbance" claim are not valuations in themselves. Members are reminded to recognise their areas of expertise and at all times to work within their limitations and not to purport expertise in areas where they are not experienced.

10. As with any valuation, detailed record keeping is critical as it is common for compensation claim cases to extend over a long period of time, especially if the claim is disputed and a reference for formal resolution is exercised. Equally, it is not unusual for a member to be instructed some time after a property has been acquired and, in some cases, where it no longer exists or it has been materially changed and, thus, the Acquiring Authority's representatives and/or the claimant will require to maintain detailed records. In addition, in such circumstances, appropriate research into the actual state of the property (construction, accommodation, condition etc.) as at the valuation date will be required, perhaps having to be supplemented by a series of reasonable assumptions where detailed records do not exist.

11. It is often the case nowadays that, as part of the overall justification for a particular public work which will necessitate the use of compulsory purchase powers, an initial forecast of the likely compensation burden on the Acquiring Authority will be sought with that forecast up-dated as time and circumstances evolve - this is often named a Property Cost Estimate (PCE). It is recommended that members exercise a high degree of care if instructed to undertake a PCE (or any up-date thereon) and to issue and always work within suitable terms of engagement that reflect the considerable uncertainties of such an exercise. This is because, amongst other things, such estimates tend to be undertaken on a "desk-top" basis with no actual inspections of the properties concerned, only limited consideration of development and/or re-development prospects can be undertaken, limited or no recourse to the financial statements the owners and occupiers of commercial and/or agricultural businesses and limited information on lease agreements and rents payable. All these factors can and will have a material effect on the amount(s) of the PCE and, thus, it is especially important that the contents of VPS1-5 are followed as far as possible, if they are not

Compulsory Purchase Association
4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

mandatory. Particular regard should be had to clear statements under the required headings in VPS1 and 3 relating to limitations of the investigations, the purpose of the PCE and material uncertainty. The basis of valuation should be clearly stated and should be the statutory basis of valuation.

12. **Even though real estate interests are compulsorily acquired, that does not necessarily mean that compensation payments will then flow automatically. Indeed, the reverse is true as, in the first instance, a claimant needs to formally lodge a claim for compensation. Further, the amount of compensation may not be able to be accurately assessed in the short-term (this is particularly the case where part-only of a property has been acquired) and/or there is a significant difference between the amount formally claimed and the opinion of the Acquiring Authority on the amount due. In these types of circumstance, there will likely be a delay prior to the claim being settled and thus the compensation legislation provides for payments to account to be made. These payments to account are known as Advance Payments of Compensation and represent 90% of the Acquiring Authority's estimate of the likely compensation payable. Thus, once an application for an Advance Payment of Compensation has been received together with all relevant information that Acquiring Authority deems necessary, then the onus is on the Acquiring Authority's valuer to make an accurate assessment. While such an assessment is not an offer to settle the claim, an Advance Payment is a valuation under PS1 and PS2.**

Obligations on Valuers

13. As with rent reviews and rating appeals, disputes about the correct level of compensation due will, on occasion, arise and, as stated above, there are different entities within the four nations of the UK which have been established to deal with the resolution of these disputes. The member's duty is to the client (which will either be the Acquiring Authority or the claimant). Accordingly, until the member takes on the role of an expert witness, the member can advocate the claim on behalf of the client by way of negotiation. However, members must follow the mandatory requirements under the April 2017 Professional Statement to provide balanced professional advice and to act reasonably, competently and responsibly and not to be influenced by the client to take a position which the member cannot properly support. However, once a member has accepted the role of an expert witness in a compensation dispute, the member's duty switches to the appropriate resolution body and, in such situations, the relevant mandatory RICS Professional Statements on surveyors acting as expert witnesses are applicable in addition. Accordingly, members must give their objective opinion to the court or tribunal once the member has taken on the role of an expert witness.

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

14. In conclusion, compulsory purchase is a complex area and, while many of the key principles in the assessment of compensation claims are well-established, some aspects are continually evolving as a consequence of new legislation and/or Upper Tribunal (Lands Chamber) and Lands Tribunal decisions. Thus, the April 2017 Professional Statement requires that all members working in this niche field require to constantly keep up-to-date with primary and secondary legislation changes as well as case law decisions in order that they are able to provide the high standard of service that clients, both within the public and private sectors, require and expect.

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

Temporary Possession

The Neighbourhood Planning Act 2017 ("NPA 2017") temporary possession provisions have still not come into force and the government has not published proposals for the regulations which must be made under the NPA 2017. The CPA intend to make recommendations on what regulations should be made and this presentation and paper explains what is proposed.

1. Introduction

1.1 From the point of view of the promoter of an infrastructure project, the availability of powers of temporary possession ("**TP**") provides essential flexibility in allowing the scheme to evolve through the consenting stage and then detailed design. Land can be occupied for a limited period of time to allow for construction compounds to be established and environmental mitigation works undertaken. Compared to permanent acquisition, TP will usually have a lesser impact on land owners and occupiers and on the promoter's property budget.

1.2 But flexibility for a promoter often means uncertainty for the owner or occupier. Will the land be permanently acquired or temporarily possessed (or both)? How long will the occupation last for? How will the land be restored? When will compensation be paid? What happens to the terms of any tenancy? The use of TP powers need, therefore, to be justified by promoters and there needs to be transparency and accountability in the use of TP powers and the expectations in that regard should be set out in updated CPO Guidance.

1.3 The Planning Act 2008 ("**PA 2008**") extended the availability of TP powers to a much wider range of infrastructure schemes and the Neighbourhood Planning Act 2017 ("**NPA 2017**") sought to extend them wider. The provisions of the NPA 2017 have still not come into force and the government has not published proposals for the regulations which must be made under the NPA 2017. This paper sets out the recommendations of the CPA Board on what regulations could be made, and takes into account views expressed at the CPA Reform Lecture held earlier in the year on this topic, as well as consultation of members post the Reform Lecture. In short the CPA encourage Government to progress towards giving force to the provisions of the NPA 2017. Whilst those promoting NSIPs may feel that there is no need for the TP provisions to come into force, they will be of significance to those promoting, for example, Highways Act Compulsory purchase orders and regeneration schemes under the Town and Country Planning Act 1990 or similar legislation.

2. The Development of TP Powers

Statutory powers since 1845

Compulsory Purchase Association
4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

2.1 TP powers have been included in local and hybrid Acts of Parliament since the Railways Clauses Consolidation Act 1845 (if not before). The 1845 Act contained model clauses for TP allowing the temporary use of private roads within 500 yards of the railway and TP of land for the construction of the railway or accommodation works, provided the land wasn't part of residential grounds. Three weeks' notice was to be given and the owner could object to the temporary possession with any dispute being resolved by two justices who were also to assess compensation if it could not be agreed. In certain circumstances, the owner of the land could also compel the railway company to permanently acquire the land.

2.2 The Transport and Works Act 1992 established a new regime for the authorisation of railways and tramways to save Parliamentary time in considering numerous local Bills in Parliament.

2.3 The introduction of the development consent order regime by the PA 2008 led to TP powers being made available for a broader range of schemes leading to increasing pressure for reform of the provisions.

2.4 The modern version of TP Powers was set out in the Transport and Works Act Model Clauses Order in 1992[7] and comprise the following features:

- Applies to land specified in a schedule which can only be temporarily possessed;
- A power to remove buildings and vegetation from the land;
- A power to construct temporary works (including means of access);
- 14 days' notice must be given to owners and occupiers of the land;
- The land must be given up by the end of 1 year after completion of the relevant scheduled work;
- Before giving up possession, all temporary works must be removed and the land restored to the reasonable satisfaction of the owner but there is no requirement to replace a building that has been removed;

[7] The current version is the Transport and Works (Model Clauses for Railways and Tramways) Order 2006

Compulsory Purchase Association
4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

- Compensation is payable for any loss or damage arising from the TP, disputes being referable to the Upper Tribunal.

2.5 A comparison between recent Transport and Works Act Orders/Development Consent Orders with the model clauses shows limited but significant evolution. In particular:

- TP powers apply not only to land specified in a schedule but to all of the land that may be taken permanently, allowing the promoter a choice of taking the land temporarily or permanently (or temporarily and then permanently);

- However, it is not permissible to acquire permanent rights or impose restrictions on land which is scheduled as only being subject to TP, at least without making it absolutely clear to landowners of the intention to do so (see the Secretary of State's decision on the A585 Windy Harbour to Skipool Improvement Scheme DCO).

- The promoter can construct not just temporary works but permanent and mitigation works on land temporarily possessed giving rise to the need to secure access for maintenance or agree a scheme with the owner in which the latter takes responsibility; and

- The obligation to restore excludes the removal of permanent or ground strengthening works.

2.6 The High Speed (London-West Midlands) 2017 Act contains generally similar provisions but with the power to construct permanent works restricted to those specified in the Act, a rather more generous 28 days' notice given to owners and fairly elaborate provisions for a scheme of restoration of land to be agreed between the nominated undertaker, the owner and the local planning authority with central Government determining a scheme in the event one can't be agreed.

2.7 There are similar TP powers for the maintenance of works extending for 5 years after the authorised works are first opened for use but these cannot be applied to residential properties or gardens and only temporary works can be constructed.

The practical use of powers

2.8 Just as TP powers have been extended in recent years, they have been applied to different categories of land. Until relatively recently, TP powers were usually only secured and exercised in respect of undeveloped land (e.g. agricultural, open storage or car parking). In the last 10 years, powers have

Compulsory Purchase Association
4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

been secured more frequently for TP of developed land partly in the hope of reducing compensation costs but sometimes also because of a view that TP is a lesser interference with human rights than compulsory purchase (this proposition is discussed in more detail later in this paper).

2.9 While the use of TP powers before the Planning Act 2008 was rarely controversial, their extensive recent use has brought into focus a number of tensions. For example, it was unclear when the limitation period for a claim for compensation arises (at the beginning or the end of the temporary possession)[8]; owners and occupiers are often concerned that they do not know when the land will be handed back to them; there is no provision for advance payments of compensation; and it is unclear what "loss and injury" covers in terms of compensation.

2.10 Concerns of this sort led to pressure by stakeholders, including the CPA, for primary legislation to create a temporary possession code.

3. The Neighbourhood Planning Act 2017 ("the NPA 2017")

3.1 The NPA 2017 introduced what is effectively such a code. In summary terms the provisions are as set out below.

3.2 Section 18 extends the availability of TP powers to any authority who would be able to make a CPO.

3.3 Section 19 sets out a procedure for authorisation. The authorising instrument can be for TP alone or TP with compulsory purchase powers. The authorising instrument must identify the land subject to TP, describe the purposes for which TP is required and specify the period of time for which the land may be subject to TP.

3.4 Section 20 sets out notice requirements. A notice must give at least 3 months' notice and specify the period of TP. Subsequent notices can be given to (effectively) extend the period of TP. Any notice must be served within 3 years if the authorising instrument is a CPO or 5 years if not.

3.5 Section 21 contains provisions for freeholders and occupying leaseholders to serve counter-notices (within 28 days of receipt of a TP notice) which would limit temporary possession to 12 months for residential properties or six years for other types of property. The authority must accept the

[8] Karas, Tozer & Denyer-Green (JPL 2016 p 756-763) argued persuasively that each day of temporary possession creates a cause of action (akin to trespass) so that, for example, a claimant whose land had been temporarily possessed for seven years would risk a limitation defence being brought against the first year's loss.

Compulsory Purchase Association
4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

limitation, withdraw the TP notice or proceed to compulsorily purchase the land. A leasehold occupier may also serve a counter-notice to the effect that the authority cannot take temporary possession of the land and must either withdraw the TP notice or compulsorily purchase the land. The authority must respond to a counter-notice within 28 days (but it is unclear what happens if it does not).

3.6 Section 22 applies section 13 of the Compulsory Purchase Act 1965 so that an Authority can enforce a TP notice.

3.7 Section 23 provides for compensation to be payable to a claimant with an interest in or right to occupy land temporarily possessed for "loss or injury" sustained. A "beneficial claimant" with the benefit of an easement or restrictive covenant over the land may also claim. When the claimant is a business, regard must be had to the period for, and the terms on which, they might reasonably have been expected to continue to trade at the land and the availability of relocation premises for the duration of the period of TP. The limitation period applies from the last day of the temporary possession and statutory interest runs from the day after.

3.8 Section 24 allows claimants to apply for advance payments. The authority must make an advance payment if a TP notice has been given but may not do so if it has not. The provisions are otherwise similar to the compulsory purchase advance payment regime.

3.9 Section 25 applies for interest to accrue on late advance payments.

3.10 Section 26 contains consequential amendments.

3.11 Section 27 sets out the powers of an acquiring authority in relation to TP land including the right to remove or erect buildings to the extent that it would be able to do had it acquired all interests in the land. The authority may also use the land irrespective of any interference with an existing right or contractual restriction on the land. However, use is limited to that described in the authorising instrument.

3.12 Section 28 provides that a tenant is not to be deemed to be in breach of the terms of a tenancy in consequence of temporary possession (except the payment of rent). A protected tenant is deemed to continue to occupy for the purposes of Part 2 of the 1954 Act unless the tenant informs the landlord and the authority that he does not wish to resume occupation.

Compulsory Purchase Association
4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

3.13 Section 29 contains supplementary provisions requiring the appropriate national authority to make provision about:

(a) the reinstatement of land subject to a period of temporary possession, and
(b) the resolution by an independent person of disputes about reinstatement.

4. **Regulations**

4.1 Section 30 sets out the areas in which regulations can be made by the "appropriate national authority" – that is the Secretary of State or the Welsh Ministers (where they are the acquiring authority or the confirming authority). The potential scope of regulations is broad.

4.2 Subsection 1 requires the national authority to make provision for the reinstatement of land and the resolution of disputes about reinstatement.

4.3 Subsection 3 devolves broad powers to the national authority to make regulations in relation to the authorisation and exercise of the power to take TP under section 18 and the circumstances in which an authority may be authorised to acquire land after securing TP powers. A number of examples (which do not appear to be exclusive) are given in subsection 4 including:

- An ability to modify any provision in relation to particular cases or types of case as the national authority considers necessary or expedient "*for giving full effect to a provision*". In all but name, this is a power for the national authority to amend primary legislation.
- Limit the period for which an acquiring authority may take TP and the circumstances in which it may do so.
- Make provision about the use to which land which has been temporarily possessed can be put
- Limit the types of land which may be subject to temporary possession.
- Require an authority to provide specified information relating to a period of TP to specified persons before, during or after the period.
- Make provision in relation to a sale by a person with an interest in land which is or may be subject to TP.
- Make provision for a person with a right to occupy land subject to TP to be deemed to occupy that land for specified purposes during the period of TP.

4.4 Before making regulations under section 30, the national authority must carry out a public consultation.

Compulsory Purchase Association
4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

4.5 The regulations will require approval by Parliament or the Welsh Assembly under the affirmative procedure (but note that it is very rare for approval not to be secured under that procedure).

4.6 There has been no indication of any action having been taken by either national authority to develop regulations.

Discussions amongst the CPA Board, the CPA temporary possession working group and consultation among members have suggested that light touch regulation on some of these topics may be the appropriate way forward in the first instance as set out below.

5. CPA Recommendations in respect of the Regulations

Recommendation 1: Orders under the Pipe-lines Act 1962 and Gas Act 1965

Development consent orders can modify or exclude a statutory provision which relates to any matter for which provision has been made in the order. Similar provisions also apply to orders made under the Transport and Works Act 1992 and the Harbours Act 1964. This means that Orders made under these regimes could contain provisions allowing acquiring authorities to exclude the temporary possession powers in the NPA 2017 (once brought into force) and substitute them with alternative temporary possession powers or modify them. However, where compulsory acquisition is authorised by an Order under the Pipe-lines Act 1962 or the Gas Act 1965 there is currently no corresponding power to modify or exclude statutory provisions relating to matters for which provision has been made in the Order.

The CPA recommend that the Regulations should enable Orders under the Pipe-lines Act 1962 or Gas Act 1965 to include tailored temporary possession provisions similar to those that will be available to other similar bespoke consenting regimes. In all cases departures should, however, be clearly justified and the presumption should be that the standard temporary provisions would be applicable save for exceptional circumstances that justify a departure.

Recommendation 2: Special kinds of land

The Government proposed that the temporary possession regulations should provide that temporary possession will only be allowed where the confirming authority is satisfied that it would not cause serious detriment to the owners or users of the land, for the following special kinds of land**:**

Compulsory Purchase Association
4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

- land forming part of a common, open space or fuel or field garden allotment;
- land held by the National Trust inalienably
- local authority owned land; and
- land held by statutory undertakers.

These special kinds of land are afforded additional protection from compulsory acquisition and the Government believes that it is necessary to provide a similar level of protection for such land in temporary possession cases.

This land is recognised by statute as having special status for CPO purposes and that additional protection should apply for temporary powers subject to the exceptions akin to those in the Planning Act 2008. CPA therefore support this proposal. Further guidance would, however, be helpful as to what would amount to serious detriment.

In addition, MHCLG proposed that the temporary possession regulations will provide that for statutory undertakers' land where the acquiring authority proposes the removal of certain apparatus belonging to the statutory undertaker, temporary possession will only be allowed where the confirming authority is satisfied that the removal is necessary for the purposes for which the temporary possession is required.

The CPA does not support this recommendation. Statutory undertakers should always be able to retain apparatus and access thereto should be safeguarded. Removal can always occur by agreement.

Recommendation 3: Separate authorising instrument for temporary possession alone

The Government proposes through the temporary possession regulations to allow certain acquiring authorities (e.g. those whose powers of compulsory acquisition are granted by Development Consent Orders) to seek temporary possession powers through a different authorising instrument in such circumstances.

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

In most cases the CPA would expect acquiring authorities to be seeking authorisation for the compulsory purchase of the land for the scheme and the land needed temporarily in the same authorising instrument. However, there may be circumstances where temporary possession needs to be sought separately. The Act provides that temporary possession should be authorised by the same type of instrument as is or would be required for the compulsory purchase. However, where the compulsory purchase had been sought through a Development Consent Order, for example, this would not be a straightforward process.

The CPA endorses the proposal for the Regulations to permit a separate authorising instrument for temporary possession alone, provided that those who are affected have the same rights to be consulted, to comment or object and to be heard, as would be available under a standard compulsory purchase order.

Recommendation 4: The treatment of parties with a subordinate interest in land (e.g. leasehold interest) that is the subject of temporary possession

There is a need to address the impacts of temporary possession of land subject to subordinate interests such as leases, tenancies or mortgages. For example, leaseholders may remain responsible to the landlord and vice versa for observing the terms of the lease, such as for the use, repair and payment of rent. However, as neither party will have control of the land during the temporary possession period they may not be able to meet their respective obligations under the lease**.**

The Act does clarify landlords' and tenants' obligations to each other during the temporary possession period. Section 28 provides that where an acquiring authority takes temporary possession of land subject to a tenancy, the terms and obligations of the tenancy, with the exception of the payment of rent and the length of the tenancy, will be disapplied to the extent that the temporary possession prevented reasonable compliance with them

The CPA recommend that the Regulations should not address issues such as how break clauses and rent review provisions under leases should be dealt with where temporary possession powers are exercised. It is tempting to provide further direction / clarification on tenancy provisions. However this would create further complication and risk unintended consequences. Indeed where there are specific provisions it sometimes ties the hands of authorities

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Guidance should however deal with how the acquiring authority should assist in such matters and agree be-spoke, pragmatic solutions. The compensation provisions of 'any loss or damage' should suffice.

Recommendation 5: Notice of intended entry

Clause 20 requires acquiring authorities to serve a notice of intended entry on each person who has an interest in or right to occupy the land before taking temporary possession. The section sets out the basic information to be included in the notice being the period after the end of which the acquiring authority may take temporary possession of the land (notice period) which must not be less than three months and the period for which the acquiring authority is to take temporary possession of the land.

The Government proposes that the temporary possession regulations prescribe what additional information should be included in the notice of intended entry in different circumstances.

The CPA recommend that, where an acquiring authority intends to undertake works on the land, the notice of intended entry sets out details of the works and proposed timescales. If the acquiring authority is proposing anything other than full reinstatement post temporary possession the notice should also indicate that fact and invite the owner's agreement to the same (see below).

Recommendation 6: Sale of land during temporary possession period

The Government proposes that the temporary possession regulations prescribe the circumstances in which an acquiring authority may be required to acquire land permanently where an owner is obliged to sell the temporary possession land and set out the basis of the valuation of the land concerned in these circumstances. The Government consider this is necessary because there may be circumstances where, during the temporary possession period, those who own or administer the title to the land may wish/need to sell the land (e.g. in the event of death or divorce, or if an owner was declared bankrupt). It is highly unlikely in these circumstances that any third party would want to buy the land at its market value where temporary possession powers are being exercised.

There is the counter-notice procedure to force permanent acquisition at the start of temporary possession, although time periods where the counter-notice procedure becomes applicable are

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

long. The CPA query how an acquiring authority could be forced to acquire land permanently outside of the counter-notice procedure without primary legislation to this effect. The CPA suggest, therefore, that permanent acquisition should be discretionary but "need to sell/hardship schemes" like those offered by HS2 could apply during the period of temporary possession with acquiring authorities being expected (through guidance) to have such schemes and those schemes forming part of the consideration when the appropriateness of the temporary possession powers are considered by the examining authority or inspector.

Recommendation 7: Re-instatement following temporary possession

The Government proposes to make provision in the temporary possession regulations that the acquiring authority must reinstate the temporary possession land to 'the reasonable satisfaction of the owner of the land' at the end of the temporary possession period. Government note that depending on what purpose the land has been used for during the temporary possession period, there may be a need to reinstate it to its previous condition before it can be returned to the owner. This will clearly depend on the particular circumstances of each case and so it is difficult to set out specific criteria on how land should be reinstated which would be relevant in all cases.

This comes to the heart of the issue and whether temporary possession powers are appropriate where the land will be fundamentally changed by the activity. The presumption should be that the land will be fully restored to its pre-works state unless the owner of the land agrees otherwise or that part of the land which cannot be reinstated (due to permanent works or apparatus) should be expected to be acquired permanently.

Recommendation 8: Other matters

In terms of other matters or variances on the above the Regulations should be used to:

- Prescribe the circumstances in which an AA may be authorised to acquire land after being authorised to take temporary possession of it. **This should be permissible and required in relation to any part of the land which cannot be reinstated to its previous condition unless the owner agrees. Flexibility should, however, be justified and if land could be acquired permanently the land needs to be categorised as such in the authorising instrument. When taking such land temporarily the acquiring authority should indicate in the notice taking temporary possession whether permanent acquisition of part or all of the land is envisaged at a later date**;

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

- limit the circumstances in which an acquiring authority may take temporary possession of land – **The CPA recommend that TP powers should not be permissible without the agreement of the landowner where the nature of the land is to be fundamentally changed and the land cannot be reinstated.**

- make provision about the use by an acquiring authority of land of which it has taken temporary possession (for example, by limiting what an acquiring authority may do or by requiring an acquiring authority to do certain things). **The CPA have considered this and note that this is inter-related to the matters that have gone before. The need to take temporary possession and what is proposed must be set out in the Statement of Reasons and authorising instrument respectively and the justification and intended use and related works should be examined at the examination/confirmation stage.**

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
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Negative equity and Compulsory Purchase- an update

The Council of Mortgage Lenders (now UK Finance) were brought to the table by MHT to find solutions for occupiers and owners trapped in scenarios where compulsory acquisition would crystallise negative equity and prevent relocation. For 2 years, nothing has moved forward, yet the problem remains. Is it now time for HMT to legislate?

1.0 Background

1.1 Negative equity arises where an owner takes out a mortgage and the capital value of the property falls below the loan. When such a property is compulsorily purchased the acquiring authority pay the market value and the lenders have their usual remedies for defaulted loans. The problem is that losses are crystallised by the compulsory acquisition on loans which could otherwise have been serviced.

1.2 This does not happen often but when it does the human impact is stressful at best or at worst tragic. The example below is from a CPA board member.

- *In 2014-2015, my company and I represented the one remaining homeowner on a Council estate in Birmingham which the local authority wanted to demolish. The owner was in negative equity. From memory, the shortfall was approximately £8,000 once the additional compensation was accounted for.*
- *The owner wanted to be able to transfer [port] his mortgage to be able to buy another property and be in a similar amount of negative equity. The mortgage lender rejected the request and also refused to allow a sale by consensual transfer due to insufficient funds to redeem the mortgage.*
- *The homeowner, isolated in a position where everyone else on the road had sold, was left vulnerable. As is sadly often the case, the property was heavily vandalised when youths nearby assumed it was empty like other properties on the road. It was then subject to an arson attack which left it uninhabitable. Thankfully nobody was hurt in the attack.*
- *However, the revaluation hugely reduced the Market Value and the homeowner was not insured. With a mortgage to pay and now much larger levels of negative equity, he moved out of the uninhabitable house.*
- *Presumably as a result of the stress involved, he subsequently committed suicide by hanging. He was found in the house. What was perhaps even more shocking was that he was a well known local Pastor.*

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

- *The mortgage lender subsequently agreed to allow a sale by consensual transfer to proceed despite the receipt then being far less than the outstanding mortgage.*
- *Had the lender permitted the mortgage to be ported, their own financial loss (if any over time) would have been hugely mitigated. Far more importantly though, had they done that, our former client would most likely still be alive today*.

1.3 Crystallising negative equity on compulsory acquisition helps nobody. The owner will struggle to purchase another property which compounds the stress of compulsory acquisition; the lender has crystallised a debt which was being repaid and the acquiring authority suffers the adverse publicity and objections to its scheme.

1.4 In March 2015 the Government launched a technical consultation on negative equity which set out the options. In October of that year a preferred option was announced for an industry led voluntary code to deal with the issue. The Government reserved its position to legislate in the event a voluntary solution was not forthcoming.[9]

2.0 The draft Voluntary Code

2.1 In 2016, HMT and DCLG led the discussions with the Council, of Mortgage lenders who represented most banks and building societies in the UK. The CPA were represented at these discussions by Keith Murray and Adrian Maher. After several iterations, this culminated in the production of a draft voluntary code. It provided for transferring (called "Porting") an existing mortgage to another property and owners using "Loss payments" compensation from the acquiring authority to reduce the negative equity. However, it

- did not apply to commercial property
- was voluntary
- allowed lenders to refuse to port the mortgage where their lending criteria had changed since the original mortgage was taken out

[9] See Para 83-86 of Government response to consultation on "Technical consultation on improvements to the compulsory purchase processes" October 2015

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

- was subject to regulators criteria for loan to value.
- Was not endorsed by the Regulator leaving uncertainty when discretion was being exercised. We understand the Regulator was aware of the proposals and had not objected.

2.2 This draft Code was never approved by the CML board. The main sticking point was CML refusal follow the code even if all their lending criteria were met. They would only recommend it's members "considered" porting and would not recommend its members *use all reasonable endeavours to port the mortgage* once it had jumped over the hurdles of lenders new lending criteria.

2.3 This impasse coincided with a change in personnel at HMT, DCLG and CML. Further changes in personnel saw no progress until 2019. CML's responsibilities have now passed to UK Finance. The CPA met their representative towards the end of last year, and briefed him.

3.0 Next steps

3.1 On the 23 September 2019 the CPA Board endorsed the need for lenders to *use all reasonable endeavours to port the mortgage* once it had jumped over the hurdles of lenders new lending criteria.

3.2 The CPA board has resolved to press Government to legislate porting of mortgages in negative equity if UK Finance either

- refuse to recommend their members should port the mortgage once their criteria are met; or
- do not actively look to conclude the Voluntary Code

3.3 The CPA have recently chased UK Finance and will be looking for a HMT champion to encourage UK Finance to adopt the Voluntary Code.

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

Reversing loss payments - s. 33A-F Land Compensation Act 1973

Investors have long benefitted from more generous statutory loss payments than those enjoyed by homeowners. Is this fair, or should the prescribed percentages and caps currently awarded be reversed so as to be more generous in favour of those who actually occupy their properties as homes?

Loss Payments	CPA Proposals for change
Executive Summary:	
What is the Problem	The present law provides for a payment of up to £75,000 to investment owners but a payment of up to only £25,000 for Occupiers of a property. However it is the Occupier that bears the burden of having to relocate its business operation and so incurs the greater cost burden; not all of which burden qualifies for compensation.
Aim	Change the 2004 Act allocation between investment owner and occupier.
What we seek	Reversing the 7.5% and 2.5% uplifts, so that Occupiers have the greater benefit from the loss payment regime.
Questions from previous discussions	-Should this apply to commercial property only? - would it be better to consider setting different rates rather than seeking simply to reverse the existing ones? –what was the rationale for the rates that currently apply and are these still the right ones to use? -should the payments to owners be dropped altogether with a 10% payment for occupiers?
Next Steps/Actions	Investigate means of alteration not involving primary legislation, but include in any major reform package

1. Basic and Occupiers Loss payments were inserted into s.33A – F of the Land Compensation Act 1973 (the 1973 Act) by the Planning and Compulsory Purchase Act 2004. They introduced payments in addition to the loss incurred as a result of the acquisition of an interest in land used for purposes other than as a main residence or an agricultural holding. Loss payments were already available for main residence and agricultural holdings.

   The concept behind loss payments is to provide an acknowledgement of the fact that a party is displaced from property against their will. This is not otherwise permitted because of s. 5(1) of the Land Compensation Act 1961 (the 1961 Act). Whilst we accept the concept of the payments, there are currently three issues with the provisions in s.33A-F of the 1973 Act.

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

- the method of calculation of the payments is ambiguous and open to disagreement,
- the "building amount " is based on Gross External Area which is difficult to measure in practice and is also inconsistent with market practice for the measurement of most buildings,
- the level of payments is not fairly distributed between occupiers and investors.

2. Ambiguity

The wording of the provisions is ambiguous in that it relates the payment to a percentage of the "value of [the claimant's] interest in land". This leads to some ambiguity over whether this means the market value of the interest under s.5(2) LCA 1961 or whether it also includes disturbance compensation and injurious affection as these items together with the amount under s.5(2) comprise the value of the interest to the owner which is the compensateable amount. In the case of occupiers, particularly leasehold occupiers, this can make a significant difference to the Loss Payments received as the s.5(2) value of the lease is commonly very low but the disturbance compensation can be considerable.

The CPA have been advised by the Department for Communities and Local Government (CLG)(now the DHCLG) that the intention of the wording was that the payment should be a percentage of the market value only, as assessed under s.5(2) of the 1961 Act. This interpretation curtails the usefulness of the Basic Loss payment in particular to those hardest hit by compulsory purchase, that is, businesses occupying leasehold premises.

3. Proposal

The CPA propose that the alternative interpretation be adopted and confirmed, that is the Basic Loss payment (and occupiers Loss Payment where applicable) be calculated as a percentage of the entire compensation payable, including disturbance. The maximum values already imposed on the Basic and Occupiers Loss payments are £75,000 and £25,000 respectively and would limit the additional expense of such a measure. If the proposal to reverse the current percentage rates for Basic and Occupiers Loss payments outlined below is also adopted, the additional expense would be further reduced or removed altogether.

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

4. Building Amount

The Occupiers Loss payment currently has alternative methods of calculation. The first is a percentage of the "market value" of the interest. However, where the interest has little or no market value the claimant can elect to calculate the amount by reference to the area of the buildings he occupies (the "Building Amount" or the area of land occupied (the "Land Amount").

The building amount is based upon the Gross External Area (GEA) of the buildings occupied by the claimant. The GEA is the area within the footprint of each floor of the building. It is the most extensive calculation of the area of a building as it takes into account walls, stairwells, bathrooms and other features that are not normally attributed a value. The problem with GEA is that it is physically difficult to establish and must usually be measured specifically for the compensation claim. If the standard market practice for measurement were to be adopted, not only would the area be easier to ascertain, it may also have been recorded previously for letting or rent review purposes.

5. Proposal:

The "buildings amount" should be measured in line with the Royal Institution of Chartered Surveyors' Code of measuring practice.

6. Amount to be paid

The Basic Loss payment is available to both occupiers and owners of a building and is based on 7.5% of the "market value" of the interest held, subject to a maximum payment of £75,000.

The Occupiers Loss payment is only available to those in occupation of all or part of a building. There are three methods which can be used to calculate it. The claimant is able to choose by which method the loss payment should be calculated. The choices are;

- 2.5% of the value of his interest
- The land amount (£2.50 per square metre of the land occupied)
- The building amount (£25 per square metre of the GEA)

For a leaseholder on a normal occupational lease or tenancy, the value of the interest is likely to be minimal. This means that they will receive no Basic Loss payment, and the Occupiers Loss payment is likely to be the building amount. The maximum amount payable for an Occupier Loss payment is £25,000 and the minimum is £2,500.

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
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7. Disparity between parties

The most common situation for commercial premises is to have an investor landlord with a valuable freehold or long leasehold land interest, and an occupying business tenant holding a lease from the landlord at a market rent. Because the lease has little or no market value, the Basic Loss the tenant receives will be at or near nil. The landlord will receive 7.5% of the market value of his interest, capped at £75,000. The tenant will not receive any Occupiers Loss payment, but this will be a maximum of £25,000. In most cases the landlord investor receives up to three times more Loss payment than his tenant, and yet it is the tenant, in having to close down or relocate his business, which has suffered the more disruption.

8. Proposal: The CPA propose the percentage rates be reversed so that the Basic Loss payment becomes 2.5% of the value of the interest subject to a cap of £25,000. The Occupiers Loss payment should become 7.5% of the value of the interest (or the land or building amount), subject to a cap of £75,000.

9. Route to reform

Under s.33K of the 1973 Act, the Secretary of State

"may by regulations substitute for any amount or percentage figure specified in these sections such other amount or percentage figure (as the case may be) as he thinks fit"

If the change is not due to a change in the value of money or land, a draft of the regulation must be laid before and approved by resolution of each House of Parliament.

10. Summary

The current Basic and Occupiers Loss payments are designed to reflect some of the inconvenience and upheaval that is caused by compulsory purchase but is not reflected in the disturbance compensation payable by virtue of s.5(1) of the 1961 Act. The CPA are concerned the payments are poorly targeted and should be adjusted to provide more compensation to occupiers, and less to investors. This would reflect the relative level of disruption and inconvenience caused to each group. By calculating the Loss payments with regard to the total compensation and reversing the current percentages, we believe that the necessary adjustment can be made without undue additional expense to acquiring authorities.

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

Two examples of common circumstances are shown in Appendix 1. Loss payments are calculated for each under the existing system, and under two potential alternatives. Our preferred proposal, A, gives an end result very close to the existing system. Proposal B takes only the change of percentages and retains the existing use of the s.5(2) value. This results in a significant under payment of compensation compared to the current rules.

Richard Asher
Paul Astbury
Updated 15/03/2020

Basic and Occupiers Loss Payments

Appendix 1

Existing System

Example 1

Take for example a 100m2 B1 unit held on a 5 year market lease from the freehold or long leasehold investor owner
Investor Occupier
Value of land taken (freehold) £100,000
Value of land taken (lease) £ nil
Disturbance £ 7,000 £75,000
Basic Loss @ 7.5% £ 7,500 £ nil
Occupiers Loss @ 2.5% OR £ nil £nil
Occupiers Loss (bldgs amt) OR £ nil £ 2,500
Statutory minimum £ nil £ 2,500
Total compensation (exc Loss Payment) £107,000 £ 75,000
Total Loss Payments £7,500 £ 2,500 Total £10,000

Example 2

Take for example a 1,000m2 B1 unit held on a 15 year market lease from the freehold or long leasehold investor owner
Investor Occupier
Value of land taken (freehold) £1,000,000
Value of land taken (lease) £ 5,000
Disturbance £ 70,000 £750,000
Basic Loss @ 7.5% £ 75,000 £ 375
Occupiers Loss @ 2.5% OR £ nil £ 125
Occupiers Loss (bldgs amt) OR £ nil £ 25,000
Statutory minimum £ nil £ 2,500
Total compensation (exc Loss Payment) £1,070,000 £ 755,000
Total Loss Payments £75,000 £ 25,375 Total £100,375
7.5% 3.3%
In both examples the investor owner receives three times the Loss Payment of the occupier who has had to uproot and relocate his business, and prepare and submit a time consuming disturbance compensation claim.

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

Proposal A

Calculate Basic and Occupiers loss payments on total compensation and switch Basic and Occupier loss %.

Example 1A

Investor Occupier
Total compensation £107,000 £ 75,000
Basic Loss @ 2.5% £ 2,675 £ 1,875
Occupier Loss @ 7.5% £ nil £ 5,625
Total Loss Payment £ 2,675 £ 7,500 Total £10,175
2.5% 10%

Example 2A

Investor Occupier
Total compensation £1,070,000 £ 755,000
Basic Loss @ 2.5% £ 25,000 £ 18,875
Occupier Loss @ 7.5% £ nil £ 56,625
Total Loss Payment £ 25,000 £ 75,500 Total £100,500
2.5% 10%

Proposal B

Reverse percentages but calculate on s.5(2) 1961 Act value.

Example 1B

Investor Occupier
s.5(2) compensation £100,000 £ nil
Basic Loss @ 2.5% £ 2,675 £ nil
Occupier Loss (bldgs) £ nil £ 2,500
Total Loss Payment £ 2,675 £ 2,500 Total £5,175
2.5% 3.3%

Example 2B

Investor Occupier
s.5(2) compensation £1,000,000 £ 5,000
Basic Loss @ 2.5% £ 25,000 £ 125
Occupier Loss (bldgs) £ nil £ 25,000
Total Loss Payment £ 25,000 £ 25,125 Total £50,125
2.5% 3.3%

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Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

S10A of the Land Compensation Act 1961 is not fit for purpose.

Section 10A (in respect of Expenses of owners not in occupation) in its current form the provision is not fit for purpose and creates a number of complications. The CPA is considering whether the government should repeal or amend the provision.

1. The need for change

Section 10A in its current form does not meet the needs of claimants or the principle of financial equivalence, which underpins the Compensation Code in the Land Compensation Act 1961. In the CPA's view the provision is not fit for purpose and creates a number of complications. Therefore the CPA should consider whether they should lobby government for the repeal or amendment of the provision.

The current provision is as follows:

10A Expenses of owners not in occupation.
Where, in consequence of any compulsory acquisition of land—

(a) the acquiring authority acquire an interest of a person who is not then in occupation of the land; and

(b)that person incurs incidental charges or expenses in acquiring, within the period of one year beginning with the date of entry, an interest in other land in the United Kingdom,

the charges or expenses shall be taken into account in assessing his compensation as they would be taken into account if he were in occupation of the land.

2. The issues

Section 10A is primarily aimed at claimants, who are landlords. The present wording creates issues for such claimants, among others, for a number of reasons:

1. The reinvestment must be within 12 months of the date of entry.
2. Where an advance payment is late or the final settlement is delayed, many claimants will not have access to the funds available to reinvest within the 12 -month period.
3. This places larger regular investors at an advantage to smaller, one-off investors, such as individuals or small family pension funds, often do not have the funds available to reinvest out of existing funds, whereas large pension funds have the funds available to re-invest in property before full compensation is received. Frequently, the final payment of compensation is not received until well after a year from the possession date.
4. It is believed that Rule 6 of S5 of the Land Compensation Act 1965 does allow for the recovery of disturbance where the claimant is not in occupation. Therefore some would argue S10A is redundant.

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

5. Most investors, who will have lost a source of income when their investment is acquired, will be anxious to re-invest (to reinstate that income) as soon as possible after the acquisition. Their main constraint is likely to be availability of funds to secure such a replacement investment.
6. The one-year time limit is at variance with the 3-year rollover relief period for capital gains tax purposes.

3. <u>The options</u>

1. s10A should be retained but amended to extend the period for re-investment either to:
    a. six years from the date possession of the land is taken
    or
    b. three years from the final settlement of compensation.

    OR

2. S10A should be repealed as being unnecessary and all claims in respect of investment costs should be made under Rule 6.

<u>4. Discussion</u>

I six years from possession date (as proposed in 1.a above) would be consistent with the limitation period for bringing a reference to the Upper tribunal (Lands Chamber) and should provide ample time in almost all circumstances where an investor does not have the funds with which to reinvest until all the compensation has been paid.

II. Three years would seem to be a reasonable period to allow time for reinvestment after the claimant has received all of the compensation, and it is consistent with other time limits in compulsory purchase, albeit these relate mainly to notice periods, and to CGT rollover relief time limits

III. The difficulty with three years from the date all the compensation is paid (option 1.b above) is that this may result in the six year time limit to make a reference having been exceeded, but this could be easily addressed by the amended s.10A expressly stating that the limitation period for such a claim shall commence on the date of the final payment of compensation.

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4a Woodside Business Park, Whitley Wood Lane, Reading RG2 8LW Tel: 0118 987 3345 Fax: 0118 987 3366
Email: cpa@compulsorypurchaseassociation.org www.compulsorypurchaseassociation.org

IV. If the compensation has not been settled and a reference is made to the Upper Tribunal (Lands Chamber) the three years would presumably extend for that period beyond the Tribunal decision.

V. The repeal would be tidy, but parties would then be relying on the general provisions of Rule 6 and the case law to date, which whilst helpful is based on specific circumstances. But, as S10A does not require proof that incurring the relevant expenses was caused by the compulsory acquisition, any repeal would have to expressly provide that incurring costs on a replacement property can be taken into account in accordance with rule (6)

5. Recommendation

I believe S10A should be retained as is provides a specific statutory provision for investors costs relating to re-investment. However, the CPA should lobby to change the provisions of S10A to allow payment of costs in connection with re-investment of the proceeds of the compensation to be claimed for any re-investment up to six years after the date on which possession of the acquired land was taken by the acquiring authority.

Richard Asher 05/02/2020

Interest Rates

Please see the notes in the executive summary

Stamp Duty Land Tax – reform of section 60 of the Finance Act 2003

Please see the notes in the executive summary

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