Compulsory Purchase Association

Compulsory purchase - compensation reforms: consultation

Consultation on amending the compensation provisions for assessing prospective planning permission where land is compulsorily acquired.
From: Department for Levelling Up, Housing and Communities

Introduction

The Compulsory Purchase Association CPA is a not-for-profit member organisation that promotes best and effective practice in the delivery of land for infrastructure, housing and regeneration through the use of compulsory purchase powers. The CPA has circa 770 members and spans a range of professional disciplines involved in the compulsory purchase process, including chartered surveyors, solicitors, barristers, forensic accountants, planners and land referencers. It is a non-partisan organisation that neither supports nor opposes specific public works schemes. Importantly, the CPA's members represent both acquiring authorities (who the Government's proposal is intended to benefit), as well as landowners and occupiers affected by compulsory acquisition. The CPA is regularly asked by government departments to comment on proposed changes to the compulsory purchase and compensation system and has had several discussions with DLUHC relating to the current proposals.

The statements made in this paper reflect the consensus views of the CPA's national committee but may not represent the views of all of its members. The outcome of polls undertaken at the CPA's recent annual conference are however referenced in the responses below. These indicate a broad consensus amongst CPA members attending the conference that the proposals are opposed.

Understanding development and hope value in the CPO context

In order to assist with the understanding of our consultation response, we set out below an outline of the way in which planning permission, or the hope of it, is reflected in compulsory purchase compensation.

Development potential may inform value in one of three ways in compulsory purchase compensation, on the basis of: (1) a real-world planning permission; (2) 'appropriate alternative development' (AAD); or (3) having regard to the prospect of a planning permission for development being granted that is not AAD. It is only the last of these that represents hope value in the sense contemplated by the Land Compensation Act 1961. AAD is effectively a deemed planning permission arising when a specific statutory criterion is met. Establishing AAD is not, as the consultation document wrongly suggests, an assessment of a certain percentage chance of planning permission being granted, but instead a determination of whether planning permission could reasonably be expected to be granted, on the balance of probability (the legal standard of proof in civil cases).

The reason that legislation provides for that assessment to be made is not to create value that would otherwise not exist absent the CPO scheme. Rather, it reflects the fact that it may often be the case that the only reason that land has not been granted a planning permission by the valuation date is because it is under the shadow of compulsory acquisition (for example, because it has been safeguarded). The CPA considers that if there is a genuine aim to provide fair compensation it cannot be right for a CPO scheme to both prevent landowners from obtaining planning permission when they would otherwise have been able to and then deny them compensation for the planning permission that they could have secured had it not been for the CPO scheme. It also does not follow that planning permission for AAD will be assumed in all circumstances.

Where planning permission would not be granted in the real world, there will be no AAD. Evidencing that development meets the definition of AAD can be challenging in practice.

In our response to this consultation, when we refer to development value this is market value reflecting either the grant of planning permission or AAD. When we refer to hope value, this is value reflecting the prospect of a more valuable use or the grant of planning permission at some point in the future.

Proposals to change AAD

The consultation documents trail, but do not seek responses on, the Government's proposals to change the way that AAD is established/the test for the same. The CPA has had some discussions with the Department in respect of these proposals and understands it will be further consulted as the proposals are developed, which opportunity it welcomes. Pending that opportunity, however, the CPA endorses the comments made about the proposals by the Planning and Environment Bar Association, whose consultation response the CPA was grateful to have seen in draft.

Response to consultation

The remainder of our response focuses on the specific questions posed in the consultation document.

3. Do you agree that there are schemes where capping or removing the payment of hope value will increase the viability of certain schemes and/or increase the public benefits delivered through the schemes?

○ Yes ○ No ◉ Not sure

Please provide details and where possible examples of schemes

We would first note that the detailed proposals (paragraphs 16 to 19) refer to limiting the opportunity for landowners to be compensated for any value associated with Appropriate Alternative Development (AAD) rather than hope value (the capping of which, together with AAD, is dealt with later at paragraphs 20-22). As noted in our introduction, AAD (where planning permission is assumed on the basis that there was a reasonable expectation that it could have been secured in the no scheme world) is entirely different from hope value where (for the purpose of assessing compulsory purchase compensation) there is no reasonable expectation of the grant of planning permission, only the hope that permission might be secured at some point in the future. The consultation document unhelpfully conflates the two terms on a number of occasions. We have sought in our response to use the correct term where possible, although this has proved challenging as a consequence of the inaccurate or inappropriate use of the terms in the questions posed.

Dealing with Question 3, whether development is viable or not depends on a range of factors that include market conditions, build costs, the cost of providing infrastructure and local authority requirements for planning contributions (including affordable housing). The payment of development value or hope value is not one of those factors. This is because development value over and above existing use value only exists when development is viable. If development is not viable, then there is, by definition, no development value.

It should also be noted that viability is an ongoing test through the life of a project. It is not crystallised at the moment a direction is applied for but will be tested at every stage of the project up to a phase construction start date. This can be seen in a variety of CPOs where land has been acquired and buildings demolished only for construction not to take place because market changes have rendered the scheme unviable. For example, the City of Bradford (Central Site) CPO 2001 led to the acquisition and demolition of a large part of central Bradford only for the developer to decide in 2008 that development was not viable. A much smaller development was ultimately completed in 2015. This makes assessing the viability of a scheme at a particular point in time and using that to fix compensation payable and/or the public benefits that a proposal is required to deliver problematic. We return to this issue elsewhere in this consultation response.

Given the limited contribution land costs make to the overall cost of most developments, removing or capping development value will not make an unviable scheme viable.

The remainder of our response seeks to distinguish between the impact that capping development or hope value would have upon brownfield and greenfield sites, since different considerations apply to each.

Brownfield sites

If a CPO scheme bringing forward the comprehensive regeneration of an area is unviable (as is commonplace for such schemes, which often rely on public 'gap' funding), it is likely that the piecemeal development of individual sites making up that scheme will also be unviable. We are not aware of any brownfield schemes in which development or hope value has had a material effect on viability. Neither the Government nor the Select Committee have been able to provide a single example.

In practice, the major issues affecting development viability currently are the significant increases in existing use values that have been seen with brownfield sites over the last few years, particularly in relation to industrial uses, combined with construction cost inflation. The Government's proposals do not limit the ability to claim for existing use value and disturbance, and would not control rising build costs and high up-front infrastructure costs. Recent examples of CPOs intended to facilitate development which appear highly unlikely to take place due to viability issues unrelated to land values include the Croydon Whitgift Centre CPO and the Brent Cross redevelopment CPO.

The situation is slightly different if a development scheme is viable. If a CPO scheme is viable then limiting claimants' ability to claim hope value might make that development more profitable, allowing for the delivery of some improved public benefits (although see below on greenfield sites on the practicality of ringfencing these). However, the reduction in land acquisition costs that might be achieved would be likely to be relatively small as a proportion of overall development costs, so that the improvement in viability would, in virtually all cases, be relatively marginal. In our view, the delay and cost of seeking a direction (and the possibility of challenge to it), together with the costs of increased objection to the CPO once made, could well significantly outweigh the benefit of any cost savings.

Greenfield sites

The position is different with greenfield sites for which major residential development is proposed (new towns, garden villages, edge of settlement extensions), where an allocation in the local plan can lead to a

substantial increase in land values. It is acknowledged that in these cases, capping compensation may enable value to be captured that could in theory be used to deliver additional public benefits.

In practical terms, however, the CPA does not understand how it would be possible to guarantee that any monies identified as otherwise being likely to be paid out as compensation could be 'ringfenced' for the delivery of other public benefits. As noted, the cost profile of schemes changes over their lifetime. If, for example, construction costs increased after the date of the direction at a greater rate than the sums 'saved' in compensation, the saved money would have to be allocated to the development generally and any 'additional' benefits identified at the time directions had been sought could not be delivered. Alternatively, if development costs reduced over time or other savings were made, it may be possible to deliver the 'additional' benefits without compromising on the compensation paid to affected landowners.

The CPA considers that capturing the increases in land values secured by landowners through the prospect of the grant of planning permission should be undertaken through the planning system or the general taxation regime, so that all landowners are affected and not just the relatively small number that are subject to compulsory acquisition. Using the latter approach would be both inefficient and unfair.

Summary

In summary, the CPA does not consider that there are many, if any, instances where the capping proposals would operate to render schemes that were otherwise unviable viable, or where they would deliver materially improved public benefits as a result. Nor does it consider that it would be practical possible to ringfence compensation sums 'saved' for the delivery of particular benefits given the changing cost profile of schemes over their lifetime.

The CPA further notes that it is not aware of any schemes that have not come forward as a result of reluctance of AAs to use their CPO powers due to the potential for hope value claims to be made. In a recent poll conducted at its annual conference, with more than 200 industry professionals in attendance (including a large cohort from acquiring authorities), only one person indicated that they considered that the payment of development or hope value was a problem impacting upon the delivery of schemes.

4. Please provide any comments you may have as to the proportionality of capping or removing the payment of hope value balanced against the delivery of public benefits. Please provide any examples you have where you believe the public benefits would be such that it would be proportionate to impose such a cap or removal of hope value to a scheme.
Please provide comments

In our view the capping or removal of the payment of development value or hope value is effectively a levy on those who may have already acquired land at that value (and may have paid tax on that basis), for which they would then be denied compensation. Landowners outside the CPO redline, but who are likely to benefit from the scheme, would not be denied that same market value. For example, a person whose land is compulsorily purchased for a new train station will have his compensation assessed on the basis that no new train station is proposed and could, under the proposals, also have any 'no scheme world' hope or development value disregarded. By contrast the proposals do nothing to capture the value uplift created by the scheme which benefits land owners in the locality whose land is not compulsorily purchased, and whose land would enjoy a value reflecting both the new train station and any other development potential it may have.

We do not consider that any public benefits that might arise (and as noted above it is unclear that any would) would be proportionate to the impact on landowners as a matter of principle. The proposal amounts to a levy imposed on landowners who find themselves within a red line drawn by others.

As explained in our answer to Q3, any financial benefits realised from the proposals are likely to be limited, if there are any financial benefits at all. We do not consider they could practically be ringfenced to deliver 'additional' benefits given the fluid position of the costs of schemes over their lifetime. The benefits would also not justify the increased opposition to CPOs, the delay in progressing schemes and the increased cost that would result. The benefits would not outweigh the unfairness (either actual or perceived) caused to private individuals who would not be compensated for the market value of their land.

It is again noted that, in a poll conducted at our annual conference, not a single member of the 200+ strong audience of industry professionals (including representatives of acquiring authorities) considered that the proposals were fair.

5. Do you have evidence of the extent to which hope value is currently claimed/paid generally in compulsory purchase situations?

(•) Yes ( ) No

Please provide details and where possible any evidence that you have as to whether hope value is more likely to be paid on particular types of schemes, for example from urban regeneration schemes to greenfield schemes or from housing schemes to transport schemes

As noted in our response to Q3, it is relatively rare for development value and hope value to be claimed as compensation following compulsory acquisition for urban regeneration schemes. Only a handful of such cases have been determined by the Upper Tribunal in the last 15 years, as evidenced by a review of recent Tribunal cases concerning hope value undertaken by two members of the CPA (which can be found at https://www.townlegal.com/wp-content/uploads/Compulsory-Reading-The-Town-CPO-Blog-01.07.22.pdf)

In theory, hope value is more likely to be payable in respect of greenfield sites where there is support for development in the local plan, but we are nonetheless not aware of a material number of greenfield residential schemes in which significant hope or development value claims have been made. Where a major new town, garden village or urban extension is proposed, we would expect policies to be included in the local plan to prevent piecemeal development. This would, in turn, limit claims for development and hope value.

In 'evidence' given to the HCLG Select Committee in the September 2018 on Land Value Capture, supporters of LVC referred to the Rooff Group case (which arose from the Olympics CPO) as an example of a landowner being paid an excessive amount of hope value where it was not justified. However, surveyor members of the CPA were directly involved in negotiations for both parties in this case and can confirm that, while an element of hope value was paid, this was less than a third of the development value claimed. The statutory compensation provisions operated in a way which limited development/hope value, notwithstanding the assumption of a planning permission.

Also, in relation to the Olympics the Upper Tribunal (Land Chamber) decision in *Halpern & Others v GLA* [2014], which dealt with the assessment of development value pursuant to the grant of a CAAD, provides a further example of how the statutory compensation provisions operate. In that case it was held that planning permission could be expected for residential development, but it would not be viable for some years in a no-Olympics world. An uplift of 15% was applied to the site's existing use value as a waste management site.

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6a. Do you think the public benefits of capping or removing hope value is more likely to arise in particular types of scheme?

○ Yes ○ No ○ Not sure

6b. Do you think any solution to this issue should be limited to particular types of scheme or apply across all types of compulsory purchase situations?

◉ Yes ○ No ○ Not sure

6c. Please provide details in support of your answers to questions 6a and 6b
Please provide comments

Please note that our response are: 6A – not sure; 6B – No (the document doesn't allow two boxes to be ticked)

As noted above (and subject to our objection in principle to the proposal), for greenfield sites, in certain circumstances (where sites have been allocated for housing, before planning policy to support a public scheme has been introduced and before the landowners have secured planning permission for their individual sites), capping or removing development or hope value may improve viability and the level of affordable housing that could be secured, as assessed at a particular point in time. However, this is subject to the general point that it is hard to see how benefits could be ringfenced over the lifetime of the project. Any benefits would also have to be weighed against the delay and cost of seeking and defending a direction, and the likely increased opposition to any CPO made following the grant of a direction.

Any scheme to which directions applied should be publicly funded and delivered with no private sector involvement at all. It would be wholly inappropriate for landowners to be deprived of development value they could expect to realise in the open market only for that value to be transferred to a private developer.

We note that if hope value capping were only available to purely public schemes, this would significantly limit the number of projects where it could be applied. DCOs are often promoted by private developers and utility companies with CP powers are private bodies. The majority of regeneration CPOs also involve a partnership between a local authority (using its CP powers) and a private developer (who underwrites the cost of land acquisition and construction).

A restriction on the use of hope value capping to public bodies that are both promoting and funding the scheme would mean that local authorities looking to promote regeneration in their area would either have to bring forward a scheme on their own (which they may not be able to fund or may not wish to fund given the risks associated with proceeding without an experienced development partner), or alternatively progress with a development partner (in the way they usually do now) in order to limit financial exposure and risk, but without the ability to apply for directions. Given the obvious advantages of working with a private developer, in practice, an application for directions might rarely be made.

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7. Do you agree with the proposal to address this through the issue of directions for specific schemes as set out in this consultation?

○ Yes ◉ No ○ Not sure

Please provide comments

We agree that, were the proposals to be adopted, a capping direction must only be applied for on a scheme by scheme basis. An application for a capping direction could only be justified where it had regard to the specific impacts on those whose land interests are affected and balanced these against the public benefits that would be delivered for any particular scheme.

However, the consultation documents suggest that AAs would need to apply for directions to cap development or hope value before they apply for CPOs and explain how much would be saved in terms of land acquisition costs and how those savings would be applied to the scheme for public benefit. The inference is that any savings that were made would be ring fenced and applied to the scheme. We have already noted our views as to the practical difficulties associated with this.

If AAs are not required to commit to the delivery of particular benefits, then the CPA does not consider that directions are likely to be justified.

Another serious practical issue is that estimating the amount of land value that might be captured would require an AA's property cost estimates (PCEs) to be both published and interrogated before a CPO was made; at a time when not all the information necessary to ensure the costs estimate was entirely accurate would be available. The PCEs would undoubtedly be challenged, and the exercise would make compensation an underlying issue of debate for the justification of a CPO at the very start of the process, something which isn't the case currently. This would add significantly to the cost burden upon AAs, both in preparing their PCEs and then defending them.

Further, the need to demonstrate that viability can only be secured through a direction is likely to lead to the CPO itself being challenged on grounds of viability/deliverability, affecting its prospects of securing confirmation.

Rather than achieving Government's aims of making compulsory purchase faster, simpler and fairer, the proposals would in our view add to the cost burden upon AAs in the early stages of the project, lengthen the consenting process, create a new forum for opposition and result in expensive satellite litigation, whilst damaging the reputation of the compulsory purchase process as fair and equal. None of the Government's stated objectives would therefore be met.

8. Do you agree with the proposal that the directions could cap the payment of compensation at existing use value or at a percentage above existing use value (excluding the payment of compensation under other heads of claim)?

○ Yes ◉ No ○ Not sure

Please provide comments

The CPA does not support the proposals. It cannot be fair for the state to forcibly acquire land from someone at less than its market value. Our experience as professionals who have collectively dealt with thousands of compensation claims (on behalf of both AAs and claimants), is that the current statutory compensation provisions very rarely (if ever) result in landowners being paid more for their interest than they would have been able to achieve in the open market had there been no CPO. On the contrary, landowners will usually secure less for land with development potential under a CPO than they would in the market since they are not able to sell at a time and on terms that suits them (rather than at a date chosen by the AA).

The current proposals would have not only have financial implications for parties affected but would also likely adverse effects on their mental health and wellbeing. This is a particular area of interest for the CPA, which recently devoted several sessions at its annual conference to the impact of compulsory purchase on mental health.

In terms of the financial implications of the proposals and their fundamental unfairness, a good example is the land acquired by HS2 for its new Birmingham station. The land was owned by four separate parties all of which were developers (or joint ventures between developers and public bodies) and all of whom bought the land at values which reflected its potential for development. Planning permissions for some of the sites had been secured in the mid-2000s but the credit crunch of 2008 meant that construction was not viable at that stage. By 2011, it became clear that the land would be required by HS2 and in 2013 safeguarding directions were made which meant that no new planning permissions could be secured. The land was compulsorily purchased at various dates in 2018. The sites were by then largely vacant save for a few meanwhile uses such as car parking and open storage. If compensation were based on existing use value, the owners would have received much less than they had paid for the land 10-15 years earlier (and on which they had paid SDLT) through no fault of their own.

9. Please provide any comments you may have as to: (1) whether it will be possible to identify certain, deliverable public benefits in applying for directions; (2) how it will be possible to link those public benefits to value captured.
Please provide comments

We have dealt with this point in our responses to Q3 and Q4.

10. Do you think that an acquiring authority should have to consult with affected landowners before seeking a direction from the Secretary of State?
(•) Yes ( ) No ( ) Not sure
Please provide comments

Certainly, affected parties must have the right to make representations to the Secretary of State and to be heard at an inquiry or hearing and to challenge the AA's case. The decision-making process will need to be transparent failing which there will be a clear breach of Article 6 (or common law fair trial rights if the Human Rights Act 1998 Act is abolished).

Government's aim (as stated in the consultation document) is for CPOs to be faster, more efficient and something AAs are more confident of using. However, by introducing a new preliminary stage, the CPA considers that delay and uncertainty is a more likely outcome. There will be organised opposition, challenges to property cost estimates and viability assessments, detailed debate over land values and compensation and satellite litigation.

If the system becomes more long winded, inefficient, subject to challenge and expensive, AAs will be less likely, rather than more likely, to use CPO powers. A well-advised AA will not apply for a direction.

11. Do you agree that issuing directions should only be to schemes where the acquiring authority is also a public sector entity?

(•) Yes ( ) No ( ) Not sure

Please provide comments

Please see response to question 6 above.

12. It might be possible for landowners to seek a planning permission so that development value applies under section 14(2)(a) LCA 1961 circumventing any cap applied under a direction. Do you think it should be possible for the directions to cap development value for any planning permission which falls under section 14(2)(a) where that planning permission is made after the "launch date" of the scheme or after the date the directions are issued if later? The launch date is defined by section 14(6) LCA 1961.

( ) Yes (•) No ( ) Not sure

Please provide comments

This could only be achieved by also amending section 5(2) of the LCA 1961 and sections 6A-6E only recently introduced into legislation by the Government. Further the launch date (when notice of the making of a CPO is published) takes place after a direction has been made. Landowners will rush through planning applications as soon as it becomes clear that an application for a direction may be made. Even the risk of CPO would deter private sector acquisition of land for the purpose of residential development, reducing the number of homes built.

The proposal is piecemeal and confused. Rather than looking at a solution to the issue Government is trying to address that will have an impact across the entire residential land market, it is focusing on a very small proportion of the land that is used to deliver development in this country. By encouraging better planning and introducing progressive policies (for example in relation to the grant of planning permission only for the comprehensive development of an area, or in relation to affordable housing provision) it would be likely to achieve far more than if it simply focuses on capping development and hope value following compulsory purchase. If policies are introduced that have a depressive effect on land values generally, these will also limit CPO compensation, because CPO compensation is based on market value.

In any event, it is considered that depriving landowners of value they can achieve in the real world, based on a real world planning permission, is fundamentally unfair for the reasons described elsewhere in this response.

13. Do you have any further comments as to how the process of seeking and issuing directions might work?
Please provide comments

We do not think they can work.

14. Do you think the proposals should go further and automatically limit the payment of hope value in compulsory purchase more generally or in relation to specific types of schemes?
○ Yes ◉ No ○ Not sure
Please provide details and justification as to why you think it would be in the public interest to go further and how the human rights considerations could be balanced in any different approach. Examples of types of schemes you think any further general application should apply to would also be helpful.

In part it would appear that the proposals to cap development/hope value for CPO compensation are based on the misconception that all developers (not just those using CPO powers) would change the way they bid for land if the compensation code were changed.

However, this is simply not true. Developers do not base the price they pay for land on compulsory purchase compensation (unless of course they are a development partner in a CPO scheme). This just does not happen.

The reality is that the majority of land acquired for residential or mixed use development in this country is either purchased with an existing planning permission, where development value reflecting that permission is paid; through a 'subject to planning' agreement where full development value is paid once planning permission is secured; through an option where development value is paid once planning permission is gained; or through a promotion agreement where developers work with landowners to bring forward land through the planning process where development value is usually shared and takes into account the developer's costs of eventually securing a planning permission.

This will not change if development value is capped for the small proportion of residential development land acquired through compulsory acquisition. Landowners not subject to compulsory acquisition do not have to sell and will only do so if they can achieve a price that makes it worth their while to do so. Developers prefer to avoid the risk of acquiring a site unconditionally without planning permission. And so, developers and owners will always adopt a pragmatic approach that sees them limiting risk and sharing in the value benefit of a planning permission.

Compulsory purchase land value capping would instead lead to a two-tier market where landowners subject to compulsory acquisition would see development value capped, while landowners not subject to compulsory acquisition would still be able to sell at a price that reflected market value. Capping development values would not make CP compensation more akin to normal market conditions. If anything, it would move it further away from normal market conditions.

It is also difficult to see how the proposals to cap development value for CPO schemes would result in more development. The wider market, which accounts for the significant majority of new development, would remain largely unchanged, and so the only way more development might take place is if there were more CPOs. While that prospect may be attractive to CPO professionals seeking more work, it will only result in more opposition to CPOs with resultant delays, for at best only a marginal financial benefit outweighed by the delay.

The proposals would in our view also serve to hinder development, in that speculators and developers would be less likely to secure land in areas which may be subject to future regeneration if there is a risk to them that any investment they make in that area may not be recouped if the land is ultimately made subject to a direction. Given that CPOs in regeneration areas are often used to deliver works that the market cannot bring forward, and to act as a catalyst for later development by private sector landowners (e.g. the Leicester Waterside CPO), the proposal would have the real potential to dampen the catalytic effects of such orders.

15. Do you have any comments on the initial equality analysis?

○ Yes ◉ No

If yes, please provide your views on the equality impacts arising from this proposal and any suggestions for how those impacts could be mitigated (please include any evidence you may have in support your views).

There appears to be no such analysis.

The consultation paper does not currently give any express regard to the impacts of the proposals on those landowners that would be directly affected by the proposals. The consultation perhaps assumes that all claimants are well resourced developers. This is not true. The majority of claimants are owner/occupier individuals, or small enterprises, where the subject land is their only asset and for whom compulsory purchase is already a very emotional and stressful experience.