Compulsory Reading

RAJ GUPTA
PARTNER

LURB in the Lords – No Hope

6 June 2022. The Queen was still on her throne and we'd just celebrated her platinum jubilee with a four day bank holiday weekend. Back at work on the Tuesday, DLUHC brought us CPOers right back down to earth with its **consultation** on proposals to abolish hope and development value when assessing compensation for land compulsorily purchased for certain kinds of schemes.

We don't know what stakeholders said in responding to the consultation because 8 months after it closed, DLUHC has not yet produced its response. We do know that CPO professionals **responded** that the proposals would be unfair and that there was no evidence that the risk of paying hope value compensation was

deterring promoters from bringing forward schemes. Any hope that the Government would listen to those concerns and those of developers concerned that the risk of CPO would sterilise land has itself now been abolished. I ranted wrote about the iniquities of the proposals in a **previous** entry. I'll try to hold back this time but no promises.

On 13 March the Government tabled amendments to the Levelling Up and Regeneration Bill currently being considered by Select Committee in the House of Lords.

Section 14A Land Compensation Act 1961

These include a new section 14A to be inserted into the Land Compensation Act 1961 which will only apply where there the CPO directs that it does so.

The effect of the new section 14A is summarised in subsection (3):

"In assessing the value of land in accordance with rule (2) in section 5, it is to be assumed that no planning permission would be granted for development on the relevant land (whether alone or together with other land)."

For some reason this doesn't apply for the change of a single dwelling into two or more dwellings but it does apply to any other planning permission. Any value from a prospective change of use or an extension requiring planning permission would therefore be ignored.

This is something of a departure from the consultation proposals where hope value could be limited or abolished. Now it is binary – if a direction is made, you get existing use value only.

The Direction

The proposal is to introduce a new section 15A into the Acquisition of Land Act 1981 which will allow a CPO to include a direction that section 14A of the 1961 Act will apply in assessing compensation. Again, this is a significant departure from the consultation proposal which envisaged an application for a direction being made after confirmation of the CPO.

Section 15A only applies to CPOs authorised under specific legislation – in effect only to CPOs including housing or for NHS purposes or education purposes (there aren't many of the latter two). It cannot be used for infrastructure projects.
If the CPO includes a direction, then a "*statement of commitments*" must be submitted alongside the CPO. This is:

"a statement of the acquiring authority's intentions as to what will be done with the project land should the acquisition proceed, so far as the authority relies on those intentions in contending that the direction is justified in the public interest."

If the CPO is for housing, the "intentions" must include the provision of a specified number of affordable housing units.

If the confirming authority is satisfied that the direction is justified in the public interest then it can confirm the order with the direction included. Otherwise, it must modify the order so as to remove the direction.

This could put acquiring authorities in something of a bind. In order to demonstrate that the direction is "justified in the public interest", they will presumably have to show that the scheme is unviable without the direction. But if that's the case, then

the CPO can't possibly be confirmed without the direction in place. I suspect that the requirement for a public interest justification will effectively have to be merged with the more general requirement for a compelling case in the public interest and so there will effectively no additional requirement.

"Additional" compensation

The prospective section 14A(6) of the 1961 Act together with a new Schedule 2 provides for the payment of additional compensation (or as some might term it fair compensation). Schedule 2A is pretty long so I'll just give the Linekerless lowlights (OK, a bit of analysis but no interviews).

Where a person entitled to compensation makes an application, the confirming authority must make a direction that additional compensation is payable if it appears that the following conditions are met:

"(a) that the statement of commitments has not been fulfilled,
(b) either—
(i) that the period of 10 years beginning with the date on which the compulsory purchase order became operative has expired, or
(ii) that there is no longer any realistic prospect of the statement of commitments being fulfilled within that period, and
(c) that the initial direction would not have been confirmed on the basis of a statement of commitments reflecting what has in fact been done with the project land since its acquisition."

So, the claimant needs to wait for 10 years or to establish that the statement of commitments won't be fulfilled. Then she has to hope that the confirming authority retrospectively decides that the actual development wouldn't have given rise to a

direction. That decision in itself appears to be a interference in the rights of the claimant and there is no provision for any kind of hearing. The question, after all, is not whether the claimant should be entitled to “additional” compensation but whether the scheme as built in fact justified the removal of an existing right to compensation.

The amount of additional compensation is the difference between what the claimant would have secured had there been no direction in place and what she actually did secure. However, this does not apply to severance and injurious affection and there’s no entitlement to any statutory interest for the intervening period – the interest payable (if any) will be specified by regulations. The regulations can also provide for the claimant to be entitled to consequential losses – it will be interesting to see how these will be defined.

If our claimant does manage to get through all these hurdles she can make a claim to the acquiring authority.

Once the direction is made it must be publicised so that other claimants can make claims. The rest of the detail (such as how to request a direction and who will determine the claim in the event of a dispute) are to be left for regulations.

In the real world

The primary purpose of these amendments are to increase provision of affordable housing. As David Baker pointed out in a recent **LinkedIn post** there is a real risk that the provisions will have the opposite effect.

Say that a developer is thinking about buying some agricultural land which has been allocated for housing or exercising an option following allocation and has

capacity for, say, 250 units. They will factor in the substantial costs of designing a scheme including the infrastructure, the costs of getting planning permission, the likely affordable housing contribution, the section 106 contributions and CIL and of course the construction and finance costs. Assuming that they can still make a reasonable profit on the costs, they will complete the purchase at significantly over the agricultural value and start the long process of turning land into houses.

What if there is a risk that, at any point in the process, the local authority can seek a CPO with a direction applying section 14A? Not only will they lose all the costs they've incurred in trying to secure an allocation and permission and in spending time and resources in working up a scheme but they will only get the agricultural value of the land back.

How will developers react to this risk? Time will tell but it would be good to know if Mr Gove has at least considered the possibility that this apparently niche piece of legislation could have huge repercussions on the housing development market and reduce the UK's already woeful house building numbers down even further.

Final thoughts

I suppose that because compulsory purchase and compensation is both niche and complex, politicians and the media aren't aware just how big a political step this is. For hundreds of years, the state has only been able to take a person's property on condition that they pay the market value of that property. In the words of Lord Justice Scott in *Horn v Sunderland the landowner* has "*the right to be put, so far as money can do it, in the same position as if his land had not been taken from him*". It is notable that Lord Scott made that classic statement in the middle of the second world war when national survival might have been thought to be a justifiable reason for infringing on the principle. Yet still it survived.

How sad that that a principle fundamental in balancing the public interest and private rights for so long will be destroyed with so little public debate.

The provision has not been considered by the House of Commons. Let's hope it gets proper scrutiny by the House of Lords.

Authors:

Raj Gupta – **message on LinkedIn**.

Partner, 07920 702 459, raj.gupta@townlegal.com

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