Compulsory Reading

The CPO Blog

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If it wasn't bad enough being back at work on a wet Monday after a four day Jubilee jamboree, DLUCH's **consultation** on compensation reform landed on 6 June with a sickening thud.

If carried through into the Levelling-Up and Regeneration Bill (LURB) and enacted by Parliament, these are the most significant reforms to the assessment of compensation since at least 1973. Unfortunately, they are also the most unfair and unworkable set of proposals on the subject since…erm…well...any one?

We'll be doing a more detailed analysis of the reforms as they evolve in due course but for now, here's our hot take. Sorry, no silly pictures or puns this time.

The CAAD Reforms

The paper is divided into two parts. First there are proposed reforms to the CAAD

(certificate of appropriate alternative development) system.

The Aims

Although set out in a consultation paper, there are no questions about the proposed CAAD reforms. Instead the Government simply presents what it intends to do by way of amendments to be introduced into the LURB during its passage in Parliament. The aim is set out in paragraphs 15 and 17.

"*15. Where AAD is established either for the relevant valuation date or a later date, section 14(3) LCA 1961 provides that it may be assumed that planning permission is in force on the relevant date. This leads to perverse outcomes: for instance, a requirement to assume 100% planning certainty for AAD when the planning likelihood may only be 51%. This artificially inflates compensation because a transaction in normal market conditions would reflect the actual risk associated with the likelihood of planning permission being granted.*

….

17. The combination of these changes will mean that assessment of value attributable to the likelihood of alternative development is more akin to normal market conditions and rebalance the position on costs and compensation between landowner and acquiring authority to a fairer one. We intend to bring forward these reforms to the compensation provisions as amendments in the Levelling-up and Regeneration Bill."

This makes it sound as if the artificial inflation is an anomaly or an accidental by-product of the legislation. But in fact the current version of section 14 introduced by the Localism Act 2011 was specifically designed to reverse the decision of **TfL v Spirerose (2009)** which held (contrary to the earlier decisions in the Tribunal and Court of Appeal) it was not permissible for the courts to convert the probability

of planning permission into a certainty when assessing compensation under rule (2). In other words the “artificial inflation” is a feature, not a bug, of the legislation passed Parliament in 2011 to address what the coalition Government considered an inequity.

That said, it must be recognised that the principle of equivalence does appear to be challenged by section 14(3), at least superficially. The rationale has always been that the advantage accruing to the claimant is fair recompense for her land being blighted (or safeguarded) preventing her from seeking planning permission for development in advance of the compulsory purchase and for being forced to sell at a date not of her choosing.

The Details

The rather sparse and opaque details of the proposal are in paragraph 16 and are contained in five bullet points.

“*16. We want to correct this to ensure that the balance of compensation and costs in relation to hope value is right. At the same time, we want to simplify the process for obtaining a CAAD. We intend, therefore, to amend sections 14 and 17 of the Land Compensation Act 1961 to:*

- *reflect normal market conditions in compensation payments by only allowing the equivalent of planning certainty for appropriate alternative development if a CAAD is obtained in relation to that AAD*”

This appears to be the crucial point but it is not obvious what is intended. For example, is it proposed that the LPA (or other decision maker) is to make a decision as to the precise percentage chances of securing permission for the purposes of valuation? 35% or 73% or 91%? I hope not. This is just not how the

planning system or planning officers work. Either a proposal is or is not acceptable in planning terms having regard to policy and other material considerations.

- *"establish a single route for determining hope value based on the likelihood of AAD, taking into account the assumptions in section 14(5) LCA 1961"*

Section 14 currently allows a claimant to by-pass the CAAD application process and simply ask the Tribunal, in determining compensation, to decide whether development would be AAD or not. If this proposal is aimed at saying that one can only get AAD by making a CAAD application to a LPA, that's arguably reasonable. If it is suggesting that hope value can only be claimed if a CAAD application is first made that is hugely problematic and I don't see how the Tribunal could properly undertake its role in ascertaining market value under rule (2) in those circumstances.

- *"remove the requirement that acquiring authorities pay the costs of landowners in seeking a CAAD – if a landowner chooses to seek a CAAD then they can do so at their own cost and weigh the risks in doing so against the benefits to value that may materialise"*

Currently the costs of applying for (and appealing) a CAAD it are claimable as disturbance compensation under rule (6). Understandably, Acquiring Authorities dislike this state of affairs – it allows claimants to work up their schemes in some detail without the AA knowing and then have a very good chance of claiming back significant costs when making a claim. This reform seems prima facie reasonable provided that (a) there is no obligation to seek a CAAD to establish hope or development value (as this would effectively prevent under-resourced claimants from ever being able to do so) and (b) there is no double-counting by deducting planning costs at the valuation stage.

- *"further streamline the process for obtaining a CAAD so that the ask on*

local planning authorities is simpler and clearer – local authorities will be asked to only issue a CAAD in relation to the type(s) of AAD applied for"

Similarly, it's sensible for the LPA to only be asked to consider the application in front of it and not be obliged to search around for any kind of development that might get permission. This reflects the approach that LPAs take in any event in my experience and the change is welcome.

- *address the issue raised in Lockwood v Highways England Company Limited around the date of determination of a CAAD where the relevant valuation date has not yet occurred*

The relevant date for determination of a CAAD where there is no valuation date (typically in cases where a blight notice has been accepted but no entry has been taken on land) is the date on which the determination is made according to the Tribunal in *Lockwood.* While the consultation is silent on how it will "*address the issue*" it's hard to see what other date could be chosen unless the intention is to prohibit applications until the valuation date is established.

All in all, it's difficult to judge the validity of the proposed reforms until more detail is provided. Certainly, the existing system needs tweaking and clarity but if (as appears likely) the proposal is for some kind of sliding scale of probability of securing planning permission in a no scheme world, I'm afraid that belies a fatal misunderstanding not only of how the CAAD system works but of planning principles in general.

Land Value Capture

Which brings us on neatly to the main event – land value capture (LVC). Here are the proposals in all their glory:

"*24. We are proposing a further measure to allow acquiring authorities to request a direction from the Secretary of State that, for a specific scheme, payments in respect of hope value may be capped at existing use value or an amount above existing use value where it can be shown that the public interest in doing so would be justified.*

25. Where directions are issued, they would provide upfront certainty for an acquiring authority as to the levels of hope value that would be payable for the relevant scheme. Schemes would then have more confidence in their property cost estimates and consequently more certainty over the viability of the scheme and its ability to deliver the relevant benefits in the public interest. It would avoid lengthy disputes over the amount of hope value payable and uncertainty years into the development of a scheme as to how much compensation may be payable in respect of prospective planning permission, particularly where the viability of the scheme or the delivery of the benefits of the scheme depend on the value paid for the underlying land.

26. Landowners would remain entitled to a fair price for their land. No-one would be paid less than existing use value and, where a cap above existing use value was directed, they would remain entitled to hope value up to the cap where hope value was evidenced. Determining the value of land and therefore a fair price requires an element of judgment. Directions will provide certainty to parties in determining that value and potentially avoid high levels of costs in debating value. Landowners would also continue to receive all other compensation payments that they would be eligible for.

27. It is the government's intention that the ability to seek a direction would only apply to acquiring authorities that are also public sector entities. Acquiring authorities may be either public sector entities like local authorities or, in some

circumstances, private companies like airport operators or utilities companies. The public interest in seeking directions is likely to be higher where they are sought by public sector entities. In addition, public sector entities are subject to the public sector equality duty under the Equality Act 2010 and will need to take that into account when considering whether to apply for directions."

LVC as a concept has been around for centuries (see the 2018 **Select Committee Report** which has given the Government some cover for the current proposals). The consultation has its roots in an argument propounded by the charity Shelter and a number of other pressure groups and policy wonks (with no experience whatsoever of CPO or development generally) that a significant contributing factor to the failure to meet house building targets is the requirement to pay market value to landowners who have their land or property compulsorily acquired. Despite scant evidence that this is actually the case, the argument has regrettably found favour with some politicians and their special political advisors.

A lot is going to be said and written about these proposals. Initial discussions with colleagues at the CPA reveal a united and frankly outraged opposition to them (irrespective of whether one works primarily on the claimant or acquiring authority side of the CPO fence). I'm not going to dwell on the obvious and inherent unfairness of depriving a land owner of the value of her land simply because it has the misfortune of falling within a red line drawn by someone else, or the myriad human rights implications. Nor am I going to point to the irony of one department of Government seeking to destroy the fundamental principle of equivalence in the very same week that another department secures permission to appeal to the Supreme Court on the basis that the decisions of the Tribunal and **Court of Appeal** offends that principle.

Instead, I'll give three reasons why, in practice, acquiring authorities won't make

applications for directions or if they do, will regret it. I'm sure this is far from exhaustive.

Only available to public sector acquiring authorities

Obviously, only a local planning authority can make a CPO under the TCPA 1990 but the reality is that almost all regeneration CPOs are for schemes backed and formulated by a developer. Local authorities simply do not have the resources or the expertise to deliver regeneration schemes of any significance by themselves. The few schemes which don't have private sector backing tend to be estate renewal schemes (where hope value isn't an issue) or small, self-contained schemes. It's hard to see how removing hope value from landowners in order to establish the viability of a commercial development (requiring a developer's profit of course) will ever be justifiable.

Disclosure of viability calculations and property cost estimates

Assuming that an application for directions is publicly disclosed so that affected owners are able to make representations (and if not there's surely clear human rights implications under article 6 of the Convention), no acquiring authority or developer will want to say that the viability of the scheme depends on securing a direction. If they don't get the direction, the CPO is dead in the water – the authority will already have admitted that it's not viable or is marginal at best. Secondly, even if hope value is stripped out, that will rarely be of any significance in the overall costs of the scheme – again, the authority will have presented an open goal to objectors when it comes to challenging the CPO at inquiry on viability grounds, particularly in an age of high inflation in construction costs. Thirdly, no authority in its right mind will ever disclose full details of its property cost estimate. To do so is to open up viability objections on the grounds of errors in the estimates

and to provide a negotiation baseline for owners and occupiers when it comes to claiming compensation.

Legal challenges

Let's say you are the owner of land worth £1m in its existing use but with an allocation and therefore with hope or development value of £10m. You are going to do your utmost to prevent a direction from being made, and if it is made, the subsequent CPO. A direction will be subject to judicial review and subsequent appeals if unsuccessful. Similarly the CPO will be attacked from every possible angle until the developer/authority decides it's **not worth pursuing**. From the authority or developer's point of view there is simply too great a risk of defeat and delay to risk a directions application.

I could go on but that's probably enough for now. The CPA is, as I write, putting together a response to the consultation. If you feel as strongly as I do about the unfairness and unworkability of the proposals, I urge you to also respond.

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