Compulsory Reading

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The Vicarage Field CPO and viability

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With stunning vistas across Dagenham

Introduction

On 4 October planning Inspector Katie McDonald MSc MRTPI issued her delegated **decision** not to confirm the London Borough of Barking (Vicarage Field and Surrounding Land) Compulsory Purchase Order 2021. In my view, it is the most important CPO confirmation decision for years and may lead to significant changes in how CPOs are promoted in the future. So much so, that I'm going to split discussion of the decision into three posts:

- This entry will summarise the decision and the primary reason for rejection (the scheme's viability issues) and what that means for CPO promoters.
- In part 2, I'll look at the Inspector's criticisms of the promoter's engagement with occupiers and the deficiencies of its relocation strategy.
- Part 3 will be a sweep up of other points made by the Inspector including in relation to planning, publicity and timing matters with some bonus musings on whether the CPO reforms proposed by LURB (e.g. conditional confirmation) would have made any difference to the outcome.

I would note that I have no specific knowledge of this scheme beyond what I have read in the Inspector's decision and some of the inquiry documents. A shout out to the programme officer (Helen Wilson) for maintaining a well-organised publicly accessible **data room** where all the inquiry documents including proofs of evidence and submissions can be seen. This should be standard practice for all CPOs. I would also urge DLUHC to implement its proposal to maintain a register of CPO decisions (already in place in Scotland and in Wales) to improve inclusion, transparency and best practice in CPO promotion and decision making.

The three main tests for CPO

Before we get into the meat of the decision, it's worth reminding ourselves of the main boxes a CPO has to tick in order to get confirmed. These are set out in DLUHC's Guidance on Compulsory purchase process and The Crichel Down Rules (2019).

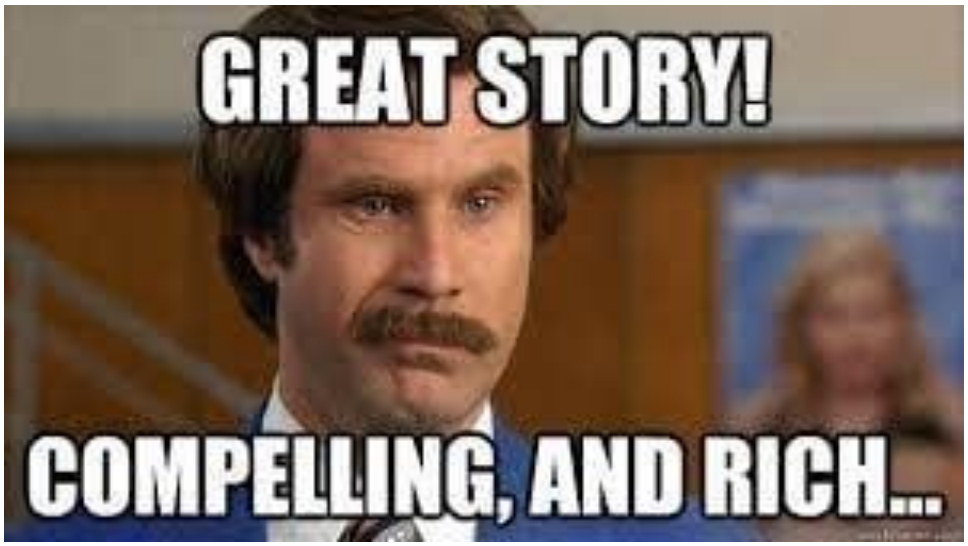
First and foremost, there must be a compelling case in the public interest to justify interference with the human rights of those with an interest in the land affected by the CPO.

Second, it must be shown that there are no material impediments to the scheme coming forward within a reasonable timeframe. Typical impediments are planning and financing. It's important that schemes are deliverable – unimplemented CPOs blight land and leave occupiers of affected property in limbo, sometimes for many years. Worse still is where a CPO is implemented but the development does not proceed – for example, the Bradford and Dartford schemes mentioned in a **previous blog**.

Third (and it is arguable whether this is a pass/fail test – more on this in part 2), the promoter must use reasonable attempts to acquire land voluntarily so that compulsory purchase is a last resort. This implies full and early engagement with owners and occupiers of property affected by the CPO and meaningful assistance provided to mitigate the impacts of the compulsory purchase.

The CPO passed the first test with flying colours. There was an "obvious and desperate need" to regenerate Barking's town centre. With 5 clustered residential towers reaching up to 26 storeys, a 6-8 screen cinema, a music venue, community uses, affordable housing, a food hub and much improved connectivity, the scheme would "*provide comprehensive, transformative change to the town centre*". The

Inspector concluded that "*there is an extremely compelling case for the acquisition of the Order Lands*".



Source:quickmeme.com

An anchor tenant commits

It was in relation to the second and third tests that the Acquiring Authority ("AA") was found wanting by the Inspector.

Viability and CPO

For most of its history, compulsory purchase has been a solely public tool used by authorities to enable the construction of sewers, transport systems, highways and other infrastructure or for slum clearance and new housing estates. Viability wasn't an issue – the budget for the scheme would already have been approved. As local authority funding started to shrink from the 1980s, many regeneration schemes had to be either wholly or partly funded from the private sector. It's notable that the principle of the state using compulsory purchase powers in order to deliver private development has never really been debated in the UK as it has in the United States where the Supreme Court in ***Kelo v City of New England*** (2005)

controversially held by a 5-4 majority that the use of eminent domain for private development was constitutional.

At the risk of stating the obvious, viability is central to private sector property development. While a developer may be willing to spend money semi-speculatively in devising a scheme and getting planning permission for it, he won't sign off on construction contracts unless he knows he will be able be able to turn a reasonable profit (say 17.5% on costs) from it.

For town centre regeneration schemes, viability is increasingly challenging as the bricks & mortar retail sector shrinks while construction and finance costs rise.

While questions of viability are often raised by objectors in CPOs, they often don't get much traction. It's not often that objectors have the resources to rigorously interrogate the assertions of the AA as to viability and deliverability matters (the refusal to confirm Arrowcroft's Croydon Gateway CPO in 2008 on viability grounds is a good example of a successful challenge where the objector did have the expertise and resources to undertake a forensic analysis of the purported viability of the scheme). In my experience, promoters typically rely on forecasts or on very basic viability analysis (often under the shield of commercial confidentiality). Alternatively they may refer to the prospects of public or other forms of funding coming forward within a reasonable time.

And it should be noted that an AA does not have to categorically demonstrate the viability and deliverability of the CPO scheme. The Guidance says "[T]he greater the uncertainty about the financial viability of the scheme, the more compelling the other grounds for undertaking the compulsory purchase will need to be." I've always found this to be rather confusing guidance. Either viability is uncertain or not. To my mind, there are no gradations in certainty. Similarly, there is either a

compelling case for compulsory purchase or there is not (in which case the CPO should fail irrespective of viability).

Viability Appraisals

The problem arose because the only substantive assessments of viability before the Inspector dated from 2016 when the planning application for the scheme was under review (we'll look at the delay between permission being granted and the CPO being made in part 3). Assessments carried out by DS2 and GVA found the scheme "substantially unviable" albeit DS2 were optimistic that rising residential and commercial values in Barking town centre would make it viable in the long term. GVA found the residual land value of the development was just £400,000, less than 1% of its existing use value. In any event, it was not disputed that as at 2016 the scheme was not viable.

Of course, viability reviews for planning applications are aimed at testing the affordable housing and other planning obligations a scheme can deliver rather than whether a scheme with the benefit of a planning permission is viable. The Inspector recognised that. However, in the context of the scheme being considered "substantially unviable" in the developer's own 2016 viability appraisals, the Inspector could not accept the failure to provide any form of updated assessments as set out in the following paragraphs of the decision:

"144. The reason for not providing an updated viability appraisal is said to be linked to commercial confidentiality. To share the information at this stage could, I am advised, hamper the deliverability of the scheme by releasing sensitive information to the open market. Whilst I understand the sensitivities to sharing this type of information, I am left in a position whereby the only independent evidence

of viability presented concludes the CPO scheme to be substantially unviable 6 years ago.

145. An updated appraisal could have been redacted, or even, as suggested by Mr Elvin KC (representing the 24-34 Station Parade), subjected to a 'data room' exercise, carried out by an independent expert under a non-disclosure agreement. This would have reviewed the appraisal and provided an independent peer review that the scheme was viable.

146. The AA claim that this would have taken me nowhere, as this evidence could not have been tested. I disagree. It would have provided an independent and clear indication that the scheme was viable when assessed by an expert in the field. At the very least, it would have provided some comfort as to the likelihood of the potential financial viability, given the gravity of the conclusions in the viability appraisal that I do have."

It's possible that in light of the Inspector's decision, "data room" testing of commercially confidential viability information by an independent expert may well become standard practice for CPOs where viability or funding is in question. It's worth quoting the AA's **closing submissions** on this point:

"As to Mr Elvin QC's suggestion of an independent review that maintained the confidentiality of the commercially sensitive material in the appraisal, how would this help? It would leave the objector unable to question the independent expert on the figures in the appraisal or the operation of the appraisal itself. As Mr Elvin himself remarked in response to Mr. Cornforth's evidence, "I have not got the figures so I cannot examine that further". This would remain the case. The inquiry would still be left with the assertion from objectors that since the model and the commercially sensitive figures have not been disclosed, the evidence is lacking."

I think there is some force in this argument albeit it did not ultimately persuade the Inspector who was perhaps influenced by the increasing trend and guidance in the planning sphere in **the Planning Practice Guidance** on making viability assessments publicly available other in exceptional circumstances. If an objector (or indeed the AA) has no access to the figures underlying the appraisal, then how can the independent review be properly questioned? It seems to me that there is a risk of the Inspector effectively delegating a key part of her decision-making to a third party.

The AA's closing submissions sought to justify the failure to provide an up-to-date viability assessment by saying that it would be providing the market with commercially confidential information. I'm not convinced. If a developer can provide an assessment for the purposes of reducing the amount of affordable housing he should provide, why can't he do so to in order to justify taking someone's property?

If there is a confidentiality issue, I don't think the solution is for an independent appraisal to be undertaken without regard to the actual developer's inputs. This raises more issues than it solves given that the valuer will inevitably have limited knowledge of the developer's approach to the development which might make a very significant difference to the appraisal. There are also questions as to who would select and pay for the independent appraisal and it must be acknowledged that no two valuers will come to the same conclusion on value for a scheme of this size.

Deliverability

In the absence of an up-to-date appraisal, the developer attempted to convince

the Inspector of the scheme's deliverability based on future increases in residential and commercial values (partly caused by the scheme acting as a catalyst for growth).

The AA argued in closing that the real question was subjective – whether the developer intended to construct the scheme:

"Since the key question is scheme delivery, the fact that objectors may believe the Scheme's viability to be unproven is not on point: it is not the objectors who will be delivering the Scheme;

A key question is what the developer responsible for delivering the Scheme has concluded. In the present case, the unchallenged evidence is that the Developer, who is a sophisticated real estate investor with a proven track record of delivery and a highly regarded market reputation, and whose assessments are underpinned by independent advice, judges the Scheme to deliver adequate returns based on regular, quarterly appraisals using a bespoke investment model tailored to the circumstances of Barking

…

It seems that the implication of the objectors' points is that if more evidence had been submitted, it might be shown that the investment committee of PBBE had somehow "got it wrong". Presumably you would then be asked to substitute, in place of their judgment that they should proceed with the Scheme, your judgment that they should not. This is inherently implausible. Your appetite for risk, or the objectors, is not on point. PBBE's is, and its view has been explained and subjected to testing. The implausibility of the objector's line of argument also lays bare the lack of substance in the suggestion that a consultant should have undertaken a confidential review of the appraisal and given evidence of their conclusion while maintaining confidentiality. If PBBE may have "got it wrong", no

doubt the consultant could, too, and those challenging the Scheme would no doubt be quick to make this point"

The Inspector was not convinced by this argument. The agreements between the developer and the Council did not oblige the developer to proceed with the scheme (which is entirely standard of course). She concluded:

"Accounting for the spend to date, it is clear that PBBE has funds and would have access to funds. But no developer or financial services company would invest in a product that was not going to make a return. It would not make financial sense, no matter how invested they are in the scheme, and whilst they have underwritten the costs of the CPO process, there is no commitment to build out the scheme. Furthermore, the costs associated with acquiring the land may be considerably more than anticipated when business extinguishment costs are factored in. Additionally, no concrete evidence has been presented in relation to future occupation."

What's next?

It's not absolutely clear whether the refusal to confirm the CPO is based solely on the viability and deliverability findings of the Inspector or if it would have been refused in any event on the grounds of inadequate negotiations with third parties (described as "adding to my concerns").

I do not know if the AA intends to legally challenge the confirmation decision but (without expressing any view on the merits) I would certainly welcome scrutiny of the Inspector's decision by the Courts. In my view, the Secretary of State should not be delegating decisions on CPOs of this importance to Inspectors which is arguably contrary to his own delegation policy in paragraph 27 of the CPO

Guidance which indicates that decisions will not be delegated where the CPO conflicts with national policies on important matters and raises novel issues, both of which apply in this case. Review of Inspector's reports by Government officials and lawyers and Ministers is, in my view, an essential safeguard where a CPO decision such as this has such far-reaching wider consequences.

Personal opinion not legal advice. Thanks to Paul Arnett for his input into this article.

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