Compulsory Reading

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Vicarage Field CPO – stakeholder engagement

In part 1 of this series of posts on the **decision** by an inspector not to confirm Barking and Dagenham's Vicarage Field CPO, we looked at the primary reason for refusal – that the Inspector could not be satisfied that the scheme was viable and therefore would be delivered.

The Inspector also stated in her conclusions:

“Added to this are my concerns that inadequate negotiations have taken place, when considering the CPO Guidance…..
The efforts to acquire the CPO lands by private treaty have also been largely ineffective. Claims are made by objectors that the financial offers have not been market value, and it is the shopping centre that has failed, not the surrounding businesses on Ripple Road and Station Parade. There have also been limited efforts to relocate those affected by the CPO to date. A ‘not before’ date has been absent and this has resulted in those subjected to the CPO unable to fulfil business plans, living in limbo for a long period of time. Full information was also not provided at the outset and there was no clearly specified case manager.”

It's unclear whether the CPO would have failed solely on inadequate property owner/occupier engagement (in the event that viability was not an issue). However, it is plain that a CPO promotion which cannot demonstrate adequate engagement will be at risk in the future.

DLUHC’s guidance on compulsory purchase (“the CPO Guidance”) set outs the following checklist under the heading “**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 consider [*note the unhelpful permissive nature of the guidance*]:

- providing 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

- appointing a specified case manager during the preparatory stage to whom those with concerns about the proposed acquisition can have easy and direct access
- keeping 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
- 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))
- offering advice and assistance to affected occupiers in respect of their relocation and providing details of available relocation properties where appropriate
- providing a 'not before' date, confirming that acquisition will not take place before a certain time
- 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"

The Inspector asked herself whether the promoter had complied with each of the elements of the Guidance.

Before looking at each element in turn, I would note that it appears that most of the engagement problems were rooted in uncertainties over viability and funding and therefore timing of the scheme. Neither the developer nor the AA knew whether the scheme would be delivered and if it could, when it would be delivered. As a result, there was a natural reluctance on their part to commit to early

purchase of interests and limited scope for meaningful negotiations with businesses over the funding and timing of acquisition and relocation.

Delay

I'm going to deal with this first as setting out the timeline gives context to the Inspector's conclusions on some of the other matters.

A local authority's decision-making programme on a project that needs planning permission and a CPO should ideally look something like this:

- Pre-application consultation on planning
- Planning Application
- Resolution to grant planning permission subject to completion of a section 106 agreement
- Resolution authorising officers to negotiate an indemnity agreement (and other agreements if required) with the developer, undertake land referencing, and otherwise take all steps necessary to prepare the CPO
- Planning permission granted
- Resolution to make CPO (and, if applicable, appropriate Council land)
- CPO made and submitted for confirmation

This is obviously simplified. On big schemes delivered in phases over a number of years, more than one CPO may be needed to assemble the land. If the Council has significant land holdings within the red line, a development agreement or agreements may also be required.

For a properly defined and funded scheme, the process from consultation to submission of the CPO will ideally take around two years.

Since there is no requirement for a local authority to consult on a CPO, it's important that there is not too long a gap between the planning consultation and the making of the CPO. The period between the completion of the indemnity agreement (say a year or so) allows sufficient time for negotiations to take place.

Source: shutterstock.com

The key dates for the Vicarage Field permission and CPO ended up like this:

Early 2015	Letter sent to landowners seeking to acquire by agreement
August 2016	Pre-planning application consultation and application made
January 2017	Resolution to grant planning permission
April 2017	Section 106 agreement completed and permission issued
March 2018	Resolution authorising officers to negotiate indemnity agreement and prepare CPO
July 2018	Resolution authorising making of the CPO subject to completion of indemnity agreement and other matter
March 2021	Deed of Indemnity and Agreement for Lease completed
June 2021	CPO made and submitted for confirmation

This is, to say the least, an elongated timetable. The most significant gap is the nearly three years between the resolution authorising the CPO and the CPO

actually being made. This is highly unusual – generally a CPO is made within a few weeks or days of the resolution. The Inspector summarised the reasons given for the delay:

"*The AA comments that the 3 years in between Cabinet approval and making the Order were taken up with preparing the site, including land referencing work, negotiations to acquire land by private treaty, amending the Order to ensure no land take from Network Rail and progressing the reserved matters. There was also the matter of drawing up the AGL and DI legal agreements.*"

The Inspector, rightly in my view, did not think that this amounted to a reasonable excuse for the delay. As she noted, negotiations to acquire interests by agreement can take place alongside the promotion of the CPO (and had been taking place prior to the resolution) and land referencing does not take very long. Referencing should really have been completed between the first March 2018 resolution and the second July 2018 resolution as should the completion of the legal agreements – indeed, having an indemnity agreement in place is generally a pre-condition for a resolution to make a CPO.

There's also a very good argument that the second July 2018 resolution by the Council should have been refreshed prior to the making of the CPO but I suspect that would be a matter for a judicial review of the making of the CPO rather than the inquiry into the confirmation of the CPO.

Information

The Inspector noted that although there had been engagement from early 2015 with landowners and occupiers, the correspondence did not refer to CPO. it wasn't until 10 days before the CPO was made that "*a letter sent from the Council to all*

those with a land interest detailing that CPO powers would be used and an indicative date of when the CPO would be made, along with outlining the scheme. At the same time, letters were sent from GCW, making financial offers to acquire properties by private treaty and detailed that works would commence Summer 2022."

The Inspector considered this "tardy" and I think she was right to do so given that the Council had resolved to make the CPO nearly three years earlier. It's not obvious whether objectors would have known of the two resolutions in any event but if they had, it might have accelerated negotiations for private treaty sales. In fact, given that the indemnity agreement was not in place until a few months before the CPO was made, any acquisition of interests by the Council or developer before then would have been at risk.

Appointing a case manager

The Inspector noted that stakeholders had been contacted by a variety of different consultants (mainly surveyors) acting for either the Council or the developer "…*and it could not be said that there has been a specified case manager involved who provided a single point of contact to whom those with concerns about the proposed acquisition could have easy and direct access to*."

This is really a matter of good practice and I suspect that the problem arose because the Deed of Indemnity was completed so late in the day. A properly drafted indemnity agreement will refer to a land assembly strategy and create a land assembly working group to manage negotiations and divide responsibility for them between the developer and the local authority.

Offers to alleviate concerns about future compensation entitlement

The **example offer** provided as an appendix to a proof of evidence by one of the AA's witnesses provided an "all in" sum comprising the AA's assessment of market value and other heads of compensation but was not broken down into the relevant components. As noted above, the letters were sent shortly before the CPO was made but did not provide a minimum sum that would be payable.

In fairness to the AA, in my experience, it is unusual for AAs to provide such minimum sums given that future market value can't be known. There could be ways around this such as an offer which would be adjusted with reference to an index and clear guidance about loss payments, reimbursement of relocation costs etc.

Relocation Strategy

Source: wallpapers.com

A relocation strategy should be produced early in the process – good practice is to provide an initial draft at the same time as the indemnity agreement is being finalised and for the land assembly working group to then refine it.

For Vicarage Field, it seems that the strategy was not produced until after the inquiry had opened. The Inspector considered the relocation strategy inadequate in any event for the following reasons:

- National chains were offered the opportunity to relocate back into the completed development but small businesses were not
- The other relocation options were generally unsuitable and included the option of becoming market traders which the Inspector considered "*marginally impertinent*"
- Providing contacts for local estate agents was "*passing the buck*" (I'm not sure this is right if agents are an additional resource rather than the only one)
- The Council had in fact provided little practical assistance to business occupiers
- A condition of the planning permission requiring a development implementation strategy with details of phasing and mitigation of the impacts on Barking town centre during demolition and construction had not been discharged

While good practice for relocation of secure tenants and right to buy leaseholders is now reasonably well-established for housing estate renewal schemes following **Aylesbury** (see paragraphs 75-79), town centre regeneration CPOs are more problematic as developers will generally need the covenant strength and rents provided by multiples and will find it difficult to identify suitable relocation premises for small businesses.

Provision of a “not before” date

Telling owners and occupiers that their properties won’t be required before a specified date helps them in terms of business planning and their own relocation strategy:

“*Accurate phasing information would have provided many occupiers with certainty, and would have enabled certain objectors, such as Mr Sahota and Mrs Kanda, to proceed with their business plans in the intervening period from 2015 to now. Indeed, for some on Ripple Road, it could be over 4 years before their properties are required based on Mr Cornforth’s estimations, yet I have no precise phasing information. This is a poor way to treat those subjected to the CPO*.”

Uncertainty of timing is a feature of compulsory purchase and is possibly one of the greatest causes of anxiety and therefore opposition by affected parties. It’s notable that the Government, in its promotion of HS2, does not follow its own CPO guidance on this issue. Landowners affected by HS2 phase 1 would have been notified in 2012/13 that there land would be required for the scheme, would have waited until 2017 for compulsory purchase powers to be granted through the enactment of the High Speed Rail (London-West Midlands) Act 2017, and then up to 2022 for those compulsory acquisition powers to be exercised by HS2 An unlucky few have also been served with notices to treat (but not notices of entry) effectively extending powers for another three years where it is unclear whether their land is ultimately needed or not.

Negotiations for acquisition of freehold interests

The Inspector found that the AA had acted reasonably in terms of funding negotiation costs but had not properly pursed the actual negotiations.

However, the Inspector considered that the progression of negotiations were often "patchy" and objectors considered that market value was not being offered. While there was often a lack of engagement by freeholders, the Inspector felt that the AA had not properly engaged.

Conclusions

We'll never know if confirmation of the Vicarage Fields CPO would have been refused had the Inspector found the underlying scheme to be viable. Nevertheless, the Inspector's conclusions on the deficiencies of the engagement process will cause some nervousness amongst CPO promoters and their advisers.

The fact is that the CPO Guidance is less prescriptive than it should be and that has led to a wide variation in approaches to engagement by promoters of CPOs, DCOs, TWAOs and Hybrid Bills. The excellent session on mental health in CPO led by David Baker and David Holland at the 2022 CPA Conference highlighted the stress and anxiety that uncertainty in particular causes to third parties and particularly residential and small business occupiers. CPO by its nature tends to be an adversarial process but as the decision in the **Ebury Estate CPO** shows, it is possible to transform opposition to a scheme:

"*The Authority describes how the previous proposal had left an impression of failure and mistrust with affected stakeholders and the local community. The Authority responded through a very intensive programme of engagement directed towards realisation of the Scheme. The engagement embraced a range of*

undertakings and commitments to stakeholders and consistent with national, Mayoral and Authority best practice. These included offers to move to alternative accommodation and various re-housing/right-to-return commitments aimed at keeping the original community together….In contrast to a preceding atmosphere of distrust, the Authority now characterises local attitudes as 'optimistic' and 'excited' by the Scheme."

It's notable that there were only four objections to the application for the planning permission of Vicarage Field development. It was clearly a high quality scheme that could have transformed Barking's town centre. Had it been properly funded, I'm sure the AA and its (very experienced) professional team would have been able to engage more meaningfully with those affected and been able to significantly reduce opposition to the CPO.

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