

Planning for a better future

Our planning manifesto for the government



Manifesto Background Paper 7

Compulsory purchase: three essential improvements

It is common ground in the sector that the CPO regime is complex and in desperate need of reform. POS looks at how the regime could be improved as a tool to enable local planning authorities to be more proactive in unlocking sites with housing potential to support the delivery of sustainable development.

Planning Officers Society

POS is the single credible voice for public sector planners, pursuing good quality and effective planning practice. The Society's aim is to ensure that planning makes a major contribution to achieving sustainable development in ways that are fair and equitable and achieve the social, economic and environmental aspirations of the community.

We operate in three main ways:

- As a support network for planners in the public sector
- As promoters of best practise in planning
- As a think tank and lobbying organisation for excellence in planning practice

Where we can, we will work across the sector to craft proposals that have widespread support from the people who operate the planning system at the coalface: landowners, developers, agents, legal, local authorities and politicians. We will be both radical and practical as we look for solutions to tangible problems that will make a real difference to crucial areas. Our objective is to improve the planning system to enable it to deliver its key aim of sustainable development. It is within this context that we have set out this advice to Government so we can plan together for a better future.

POS Manifesto

This started in early 2014 when we looked ahead to the national parliamentary elections in May 2015. The main parties were drafting their manifestos, so we thought about what we could do to help them. This resulted in Planning for a better future: Our planning manifesto for the next government. The time since then has seen an unprecedented amount of change to the planning system, so our initial planning manifesto for the next government has morphed into an on-going planning manifesto for government.

These are think pieces that tackle a topical area within planning practice and sets out our recommendations for improvement. They comprise a growing series of Manifesto Background Papers that look in detail at specific issues. Those that are still current are summarised in our main Planning Manifesto paper that sets out the current ask from POS to the government.

The views expressed in these documents reflect the initial view of POS. It is a consensus position. It should not be taken as a final position; rather an informed starting point to debate the issues. It is expected that the recommendations will evolve as the debate progresses.

Other titles in the series can be viewed from our website.

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Summary

It is common ground in the sector that the CPO regime is complex and in desperate need of reform. POS looks at how the regime could be improved as a tool to enable local planning authorities to be more proactive in unlocking sites with housing potential to support the delivery of sustainable development. Our three key changes are:

1. CPO as a tool to tackle land banking

- A new CPO enabling power for local planning authorities to use where a site is a “housing site” and that development has not come forward after a “specified period”
- A “housing site” would include the following:
 - A site with a valid Planning Permission
 - A site with an appropriate Permission in Principle (with LPAs able to issue PiP unilaterally – see *Red Line Submissions: A Proportionate Approach*)
 - A specific site allocation in a Development Plan Document (including a Neighbourhood Plan)
- The “specified period” could be three years, to match the life of a planning permission

2. Is there a simpler alternative to CPO?

- Generally for funding purposes, LPAs often have to enter back-to-back arrangements for CPO
- The time taken to procure the right partner and to negotiate the various agreements can be as long as, or even longer than, the CPO process itself
- POS believes that a Compulsory Selling Order could be the solution
- The process would be like a current CPO, but the outcome would be an Order to sell the land with a specified minimum sales price which would be the existing use value – this would be set as part of the CSO process
- POS recommends ways in which this could be achieved

3. Modernising the compensation regime

- Land value capture is a challenge and not paying some (realistic) hope value would not be human rights compliant (Article 1, Protection of Property under the First Protocol of the Human Rights Act 1998)
- However, the regime that has built up to deal with hope value is cumbersome and can have unintended consequences
- Alternative uses, which the land owner has never pursued, suddenly in a CPO scenario are viable and incredibly valuable; much more valuable than the current use
- POS believes that in scenarios where the CPO scheme is one with a clear market value, that there should only be two compensation options available to CPO land/property owners: existing use value or (if the owner considers that there is a higher hope value) a residual land value appraisal
- This would be the total value of the CPO scheme, minus the cost of providing the CPO scheme (including supportive infrastructure) and a contingency
- The second approach would leave the CPO scheme-world land value, with all (realistic) hope value properly accounted for

1 Introduction

- 1.1 The power to acquire someone's land (or rights over their land) for some public benefit without that person's consent (but preferably without using force) has been a feature of English law for many centuries. The Enclosure Acts of the 17th and 18th centuries are probably the earliest examples. Generally, an Act of Parliament was needed to acquire land. The "modern" system has its roots in the Land Clauses Consolidation Act 1845, which, driven by the Victorian national railway boom, removed the need for special private Acts for compulsory purchase.
- 1.2 Current powers are in two parts. A public body must have an "enabling power" that allows them to make a compulsory purchase order (CPO) under the Acquisition of Land Act 1981. These enabling powers are found in a myriad of legislation, the main ones for planning being:
- Local authorities for planning purposes: s226 of the Town and Country Planning Act 1990
 - Local authorities in conjunction with other enabling powers: s121 of the Local Government Act 1972
 - Homes and Communities Agency: s9 of the Housing and Regeneration Act 2008
 - Urban Development Corporations: s135 of the Local Government, Planning and Land Act 1980
- 1.3 Other powers that are commonly used in planning and regeneration projects are a Order under the Transport & Works Act 1992, a hybrid Act of Parliament (eg the Crossrail Act 2008), a Development Consent Order under the Planning Act 2008 for a Nationally Significant Infrastructure Project and the New Towns Act 1981. There are other powers covering such disparate areas as housing purposes, educational purposes, public libraries and museums, Airport Public Safety Zones and Listed Buildings.

2 The need for reform

- 2.1 It is common ground in the sector that the legislative regime that has built up through statute and case law for CPO and the consequential compensation provisions are complex and in desperate need of reform. In 2004 the Law Commission published a report "Towards a Compulsory Purchase Code"¹ that attempted to do this. However, it was put in the "too difficult" drawer by government and has largely remained there.

Recent changes

- 2.2 More recently this area of law has been given some attention by government. The Housing and Planning Act 2016 and the current Neighbourhood Planning Bill contain changes and proposed changes to current CPO legislation.

¹ www.lawcom.gov.uk/project/towards-a-compulsory-purchase-code

2.3 The Housing and Planning Act 2016 has amendments or new provisions in the following areas:

- Rights to enter upon and survey land
- Confirmation and time limits
- Vesting declarations: procedure
- Possession following notice to treat etc
- Compensation
- Disputes
- Easements and other rights

2.4 The Neighbourhood Planning Bill contains proposed amendments or new provisions in the following areas:

- Temporary possession of land
- Defining the no-scheme principle
- Repeal of Part 4 of 1961 Act
- New time limits for confirmation notices
- Putting GLA & TfL in a better position to deliver regeneration schemes
- Various clauses to sort out some compensation anomalies including interest for late payments

Unfinished business

2.5 As welcome as these operationally focused reforms are, they do not go to the heart of the problem, which is that whole system remains complex and in desperate need of reform. Furthermore, the complexity of the system acts as a disincentive for LPAs to use CPO as a planning and regeneration tool. The resources, both financial and skills, needed to navigate the CPO process are beyond the means of many authorities.

2.6 POS supports the Law Commission in its quest to simplify, consolidate and codify this area of law along the lines set out in its 2004 report.

3 The need for change

3.1 In this paper, however, we are pushing for changes to the CPO regime to improve it as a tool to enable local planning authorities to be both more proactive in unlocking sites with housing potential and to optimise their ability to leverage more of the value created from a planning permission into supporting the delivery of sustainable development, particularly funding necessary supporting infrastructure. This paper contains three changes that will enable us to address these important areas.

4 CPO as a tool to tackle land banking

4.1 Land banking of housing sites has been in the news for many years and the current government is particularly concerned to address this problem. Whilst denied by the Home Builders Federation, the statistics on the number of unimplemented planning permissions is stark. Delays in implementing a consent (however caused) cannot explain the difference, as they produce a time lag between permission and implementation and not a failure to implement. This phenomenon is a common problem in London (especially in areas where land values are rising rapidly, such as in many parts of outer London) where land owners/traders are holding onto sites that could be developed now in the hope of capturing those rising values later. POS believes that a series of targeted amendments to CPO tests could give local planning authorities the tools they need to tackle this.

A new CPO power

4.2 To enable local authorities to be more proactive in bringing unimplemented sites forward for development, the enabling powers for local planning authorities to use CPO need to include the circumstances where a site is a “housing site” and that development has not come forward after a “specified period”. If those conditions are met, then that should be a sufficient argument to justify a CPO.

4.3 A “housing site” would include the following:

- A site with a valid Planning Permission
- A site with an appropriate Permission in Principle
- A specific site allocation in a Development Plan Document (including a Neighbourhood Plan)

4.4 The “specified period” could be three years, to match the life of a planning permission.

4.5 The risk with this approach is that developers would not put sites forward for Local Plan allocations or would not make applications for Planning Permission or Permission in Principle on land that they wished to just hold. Other potential problem areas are where local plan allocations become stalled in the process and need to be moved forward. An effective tool to deal with these problems is needed and POS thinks it has a solution.

Unilateral PiPs

4.6 In our Permission in Principle paper (Red line submissions: a proportionate approach²) we argued that local planning authorities should be able to issue a Permission in Principle unilaterally. The land owner would have a right of appeal. This would enable the principle of developing a site for housing to be established despite an obstinate landowner.

² http://www.planningofficers.org.uk/downloads/pdf/POS%20Manifesto%20-%20Red%20Line%20Apps_Aug15.pdf

- 4.7 This change is necessary because a local planning authority is unlikely to succeed with the current CPO tests in these circumstances. The unilateral Permission in Principle and reset CPO test would be a very powerful pro-active tool for local planning authorities who are looking to encourage the delivery of additional housing opportunities within their area.

5 Is there a simpler alternative to CPO?

- 5.1 In most cases a council does not have the funds to purchase land themselves as part of a CPO process. They enter either a Development Agreement or a Land Transfer Agreement with a developer in what's commonly referred to as a "back-to-back" arrangement. This is where the Council uses its powers to acquire the land and the developer effectively funds the process through an Indemnity Agreement. These arrangements sometimes need to be procured through an OJEU process.
- 5.2 Whilst this can work, it is a long-winded process. The time taken to procure the right partner and to negotiate the various agreements can be as long as, or even longer than, the CPO process itself. It is not surprising that Councils can be unwilling to go down this road. POS believes there should be an alternative route open to Councils, particularly where their aim is to unlock sites with development potential and the problem is the current owner's recalcitrance, rather than addressing site assembly issues.

Compulsory Selling Orders

- 5.3 A Compulsory Selling Order (CSO) could be a solution? The local planning authority (or other regeneration bodies such as the HCA) would be able to do this on their own without a development partner, so it should be much quicker and cheaper. The process would be like a current CPO, but the outcome would be an Order to sell the land with a specified minimum sales price which would be the existing use value. This would be set as part of the CSO process.
- 5.4 What would happen next needs to be considered very carefully. POS is suggesting two alternative approaches: a public body model and a market model.

Public body model

- 5.5 In this model the land transfers to the CSO promoting body. They can decide to sell the land, with appropriate implementation clauses, or act as the developer, potentially with a partner. The owner would be compensated at the end of either process.
- 5.6 In the former approach, the authority would put the land on the market within a set period and must accept offers at or above the minimum sales price on the CSO. If the market offered more, that would be the realisation of any hope value that might exist for the original owner.
- 5.7 In the latter approach, the original owner is still entitled to the CSO existing use value as a minimum, but any additional value would be via an overage type mechanism. Essentially a real world residual valuation.

Market model

- 5.8 In this model the land goes for sale in the market. To ensure that the land is sold in a proper manner, that the sale should be either overseen by the CSO promoting body or handled independently.
- 5.9 To ensure that the development took place there would need to be a mechanism that if following purchase of the land by a new owner, the development had not commenced and progressed within a specified period, the CSO would come back into existence and the new owner would, like the original owner, be forced to sell the land at the CSO set price. An alternative could be that in such circumstances the Public Body Model would kick in. The land would become vested in the Council who would then manage the re-sale or carry out the development. Again, the new owner would be compensated at the end of either process.

CSO impacts

- 5.10 It is often the case with CPO that they are effective as much as a threat than as an actual process. The same would apply with CSOs. Land owners would know that they cannot simply sit on land that is needed for development. Local planning authorities would have a much simpler and more accessible process to tackle any land owners that do. It would speed up the delivery of housing and give the public sector an effective tool to tackle land banking, particularly when combined with the previous suggestion of a new CPO enabling power. To further incentivise owners to get moving, the date for CSO valuation could be the date that planning permission was granted or a permission in principle was issued. This would remove any potential uplift from rising land values for land speculators over the period where the development site is land banked and act as a further disincentive to not play the land banking game.

6 Modernising the compensation regime

- 6.1 Land value capture is a challenge and not paying some (realistic) hope value would not be human rights compliant (Article 1, Protection of Property under the First Protocol of the Human Rights Act 1998). However, the regime that has built up to deal with hope value is cumbersome and can have unintended consequences. Alternative uses, which the land owner has never pursued, suddenly in a CPO scenario are viable and incredibly valuable; much more valuable than the current use. You are left wondering that if the alternative use was so valuable, why the owner hadn't pursued it hitherto? These theoretical scenarios of Appropriate Alternative Developments in the No Scheme World can be esoteric and obscure in the extreme. There must be a better way and one that has the public interest at its heart, ie the delivery of the development that is the subject of the CPO and therefore, by definition because of the CPO tests, of clear benefit to the area.

An EUV or RLV approach

- 6.2 POS believes that in scenarios where the CPO scheme is one with a clear market value, that there should only be two compensation options available to CPO land/property owners: existing use value or (if the owner considers that there is a higher hope value) a residual land value appraisal. This would be the total value of the CPO scheme, minus the cost of providing the CPO scheme (including supportive infrastructure) and a contingency. The second approach would leave the CPO scheme-world land value, with all (realistic) hope value properly accounted for. This approach to residual land value appraisal is a recognised one and could be carried out by an independent and appropriately qualified third party, to arrive at a “reasonable” value. The understanding of POS is that such an approach would also be human rights compliant.
- 6.3 It would only be in scenarios where the CPO scheme is a public works development with no real market value (eg a power station) that a Certificate of Appropriate Alternative Development type approach may still have a role.
- 6.4 The residual valuation approach should also be considered for ransom strip situations. The current approach to compensation can act as a barrier to unlocking development potential and a proportionate share of the residual value does seem more equitable in a CPO scenario.
- 6.5 POS considers a reconsideration of the compensation regime along these lines would strike the right balance between giving the landowner the right level of compensation within the context of a development scheme that is in the wider public interest to bring forward. In constrained financial times, it also leverages as much of the land value uplift (created by the grant of planning permission) as possible into the scheme to ensure delivery, particularly of its necessary supporting infrastructure.

7 Conclusions

- 7.1 POS believes that if the changes set out in this paper were implemented, particularly if this was alongside the implementation of the Law Commission’s recommendations, the CPO regime would represent a much more accessible and useful tool for local planning authorities. It would enable us to act in a more proactive way to deliver sustainable development that meets the needs of our communities.