

# COMPULSORY PURCHASE

Elaine Farquharson-Black, Brodies LLP

Keith Petrie, FG Burnett

Rob McIntosh, Aberdeenshire Council

29 January 2020





Speakers



**BRODIES**<sup>LLP</sup>



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## The Compulsory Purchase Association



**The Compulsory Purchase Association (CPA)** is a not for profit member organisation that promotes best and effective practice in the delivery of land for infrastructure, housing and regeneration through the use of compulsory purchase powers. Its members represent both acquiring authorities and claimants affected by compulsory acquisition, and come from a range of professional disciplines involved in the compulsory purchase process, including chartered surveyors, lawyers, barristers, forensic accountants, planners and land referencers. In that sense, it truly reflects the profession.

The CPA is a non-partisan organisation and neither supports nor opposes specific public works schemes. Its objective is to work for the public benefit in relation to compulsory purchase and compensation in all its forms. It seeks to promote the highest professional standards amongst practitioners at all levels, and to ensure that the legal framework for compulsory purchase and compensation is clear, fair and effective.

The CPA is active in Scotland and because of the variations in law and practice has its own website. Click [here](#) to visit.

### Want to become a member?

New members are always welcome from surveyors, solicitors, barristers, planners, accountants and others associated with the delivery or management of compulsory purchase. If you would like to join, please [Click Here](#).

### Affected by a CPO?

If you are effected by a Compulsory Purchase Order (CPO), then you can [click here](#) and review some of the documents we have prepared to help you decide what to do. The CPA cannot provide professional advice and we cannot enter into any commentary to help you, but our members potentially can help you. The CPA is a member interest organisation and we do not assess our

## What we will cover

- Making it happen – promoting the scheme
- Objecting to the scheme
- Confirming the Order
- Acquiring title
- Compensation
- Lands Tribunal





## Current Legislation

CPO procedure contained in various Acts (at the moment!!), principally:

- Land Clauses (Consolidation) (Scotland) Act 1845
- Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947
- Schedule 15/16 Town & Country Planning (Scotland) Act 1997
- Compulsory Purchase of Land (Scotland) Regulations 2003

Discussion Paper on CPOs published 17 December 2014

- 177 proposals and questions
- Responses by 19 June 2015
- Report sent to Scottish Ministers 10 October 2016



# MAKING IT HAPPEN

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## Making it happen

### What is the Scheme?

- Is it a road, is it an energy project, is it a comprehensive redevelopment?
- Identify the most appropriate enabling power, e.g.
  - Section 189 of the TCP (Scotland) Act 1997
  - Section 104 of the Roads (Scotland) Act 1984
  - Section 10 of the Housing (Scotland) Act 1987
  - Section 40 of the Housing (Scotland) Act 2006 –demolition
  - Section 10 and Schedules 3 & 4 of the Electricity Act 1989
  - Section 20 of the Education (Scotland) Act 1980
  - Different rules Network Rail – Private act, Transport and works application (TAWS); partnership CPO e.g. with Local Authority



## CPO- team Assemble

- Client at the centre of scheme not just property & Legal Issue
- **Who ?**
- Legal – internal – external/counsel
- Estates – surveyors, project managers, architects/engineers
- Planning – Policy & DM
- Technical
- Finance
- Corporate Comms
- **When ?**
- **ASP**
- **How ?**
- **Project team - software**





## Making it happen

### Is the Scheme in the public interest?

- What are the objectives of the Scheme?
- Where do the objectives come from?
- Delivery – what is the timeline? Delivery date and work back – timescales, impediments, objectors
- Funding – absolute, contingent, enough?
- What land and rights are needed for the Scheme?



## Making it happen

### Justifying the Scheme

- Planning permission – not determinative, but helps
- Policy Support (e.g. development plan)
- Other policy support (national, regional or local)
- If you don't have the policy, make the policy – e.g. SPG



## Making it happen

### Justifying the Order

- Attempts to purchase land voluntarily – ensure there is a paper trail – kept centrally as part comms strategy – genuine engagement
- Investigated other options – including “do nothing scenario” Options appraisal
- Ensure all land is needed – CPO is about must haves, not nice to haves
- Early land referencing – not just conveyancing exercise – need “Boots on Ground” – part of engagement process
- Eliminate alternatives – CPO process does not easily accommodate alternatives



## Making it happen

### Making the Order –authorising the Scheme

- Subject to Council standing orders/scheme of Governance – Full Council
- Two stage - Authorisation in principle for use of CPO (negotiations continue)
- Final approval – Committee authorisation for CPO of land for detailed Scheme = Scheme Fix!



## Making it happen

### Making the Order –Key Documents

- Committee Report – Brief Opinion Formers in Organisation – Discuss the positives and issues with senior managers and Councillors and communications
- CPO Plan
- Schedule of Interests
- Statement of Reasons – Delegate the division of work amongst the Project Team
- Developer Agreement/CPO Indemnity



## Making it happen

### Notification and Publicity

- Service on those with a qualifying interest, i.e. Owners, Lessees, occupiers, benefited proprietors
- Site and newspaper notices
- Specify time and place to inspect documents and plans (Council offices, libraries)
- 21 day minimum objection period



## Making it happen

### Schedule of Interests and CPO Map

- Identifies Owners, Lessees, Occupiers, Benefited Proprietors
- Describes land to be acquired
- Identifies rights to be created, existing rights to be acquired, varied and retained
- Land identified by reference to CPO Plan
- CPO Plan scale –1:1250 or 1:2500



## Scottish Government - CPO

- Who – contact lead officer in SG & list on website
- When – got authorisation in principle i.e. early as possible – share time line
- Why – they can factor this into time & resources – source of information on website
- What – Technical check of CPO – this very useful tool – not on merits
- DPEA – can contact them advise may be a PLI
- Why – again they factor into their workstream





## Making it happen

### Schedule of Interests and CPO Map

- CPO Plan (red line, pinks, blues and greens)
- Non-statutory Requisitions for Information – details of land ownership, occupation etc.
- Land Referencing – desktop, and on the ground
- Detailed record of land referencing should be kept, especially for site visits
- Time consuming exercise (months not days)



## Making it happen

### Statement of Reasons

- Should contain:
  - i. Reference to enabling statute (e.g. TCP(S)A 1997)
  - ii. Details of land – present use and proposed use
  - iii. Justification for use of compulsory purchase powers, including consideration of human rights issues
  - iv. A statement about the planning position of the Scheme and land involved
  - v. Details of any special considerations affecting the Order Land e.g. listed buildings, conservation area/SAMs/consecrated land.
  - vi. Impediments – e.g. Crown Land, or other consents
  - vii. Other information relevant to those affected – e.g. decant arrangements, funding.
  - viii. Details of where documents can be inspected.



## Making it happen

### Statutory undertakers

- Land acquired from statutory undertaker is subject to additional protections - 1947 Act Schedule 1 para 9
- If statutory undertaker objects then certification required from Ministers that land can be acquired or replaced without detriment to the undertaking
- CPO does not remove all other statutory protections, e.g. Electricity Act, Railways Acts, Nuclear safety and security.
- CPO of statutory undertaker land is risky – competing public interests
- Remove/avoid statutory undertaker objections as far as possible



## Making it happen

### Special types of land

- Allotments
- Public open space
- Land held inalienably by National Trust for Scotland

Authorisation needed from Scottish Parliament



## Making it happen

### Key messages to secure confirmation of the Order

- The Scheme is in the public interest
- Scheme is deliverable
- The land and rights identified in the CPO are needed for the Scheme
- CPO is necessary to secure the land and rights
- Interference with private interests is proportionate



## Making it happen

### Summary

- Committee Approvals – e.g. did they approve the correct plans
- Have you got all the land you need? Orders can be made smaller, but bigger needs agreement or a further Order (e.g. the Beaully – Denny CPO Order No 7/AWPR CPO Order No 2)
- Conversely – test the Scheme – is all the land included really needed (limits of deviation)
- Consistency between CPO and planning (especially EIA) – keep it in sync, and inside the red line



## Making it happen

### Summary

- Statutory Undertakers – timescales/CPO is not always a real solution
- Crown Land – cannot CPO
- Landowner negotiations – design changes and concessions made by project team and agents
- Liaise with Scottish Government
- Timing – the CPO does not exist in isolation
- Statutory notice and objection periods must be factored into Project timeline



## Making it happen

### Summary

- Newspaper Notices (lead in times)/service on qualifying interests
- Sufficient copies of documents for deposit



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# Objecting to the Scheme

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## Objecting

### What does the client want to achieve?

- Kill the Scheme
- Amend the Scheme/protect their position
- Compensation





## Grounds of Objection

### Procedural Grounds

- Has notification/publicity been done correctly; e.g. correct forms, sufficient time for objections?
- Did the Committee/Board approve the actual CPO scheme (correct plans)?
- *Vires* – is the Order promoted under the appropriate power? Housing/Electricity



## Grounds of Objection

### Substantive Grounds

- Scheme benefits are overstated/not made out
- Objector will deliver the Objectives
- Land take is excessive
- Impediments to delivery – other consents; finance; control of non-Order land
- Lesser rights only required – lease/servitude/wayleave



## Grounds of Objection

### Substantive Grounds

- Failure to negotiate/prematurity – CPO measure of last resort
- Public interest does not outweigh impact on private rights is the golden thread weaved through all substantive grounds of objection:
- *“In deciding whether to confirm a compulsory purchase order Scottish Ministers will weigh up the public benefit in the authority’s proposals against the interests of the people affected” – Circular 6/2011.*



## Grounds of Objection

### Alternatives

- Different Scheme or Amended Scheme
- Sufficient details of alternatives must be provided (Circular 17/98)
- If alternative includes 3<sup>rd</sup> party land – notify affected landowner
- Timing issues legitimate concern
- Increased costs of the alternative



## Stopping the Scheme

### Alternatives

- Land value is a relevant consideration
- Existence of alternative to CPO is relevant, but does not change the public interest test
- High hurdle to demonstrate alternative should be preferred
- Cost to client of promoting alternative (planning/EIA/technical detail)
- BUT – effective (perhaps only) tool to kill the Scheme/negotiating tactic



## Confirming the Order

### Right to be heard - PLI/Hearing/Written submissions

- Report submitted to Scottish Ministers
- Ministers can confirm the Order; confirm with modifications; refuse the Order
- Acquiring Authority to serve notice/advertise confirmation of the Order





# Acquiring Title

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## Acquiring Title

### Title acquired in one of two ways:

- Service of a Notice to Treat under s17 of the Land Clauses (Scotland) Act 1845;  
or
- Execution of a General Vesting Declaration

Note: Power to acquire land compulsorily only lasts for three years from the date on which the Order becomes operative.



## General Vesting Declaration

- The rules for general vesting are set out in Schedule 15 to the Town and Country Planning (Scotland) Act 1997.
- Acquiring Authority must advise of its intention to use the GVD procedure when publishing the Notice of Confirmation of the Order or any subsequent Notice.
- Notice of Intention must contain a statement of the effects of paras 1 to 8 of Schedule 18, together with an invitation to those entitled to claim compensation to provide information to the Acquiring Authority (Form 9)



## General Vesting Declaration

- The Acquiring Authority cannot execute the GVD until the end of a two month period starting from the date of publication of the Notice.
- Having executed the Declaration, the Acquiring Authority must serve Notice in the prescribed form specifying the land and the effect of the Declaration and it will state the period within which the Notice will take effect, which must be not less than 28 days.



## General Vesting Declaration

### The effect of the Notice is:-

- At the end of the period, the land vests in the Acquiring Authority as if they had made a Notarial Instrument which had been recorded in the Land Register;
- Compensation can be determined; and
- It fixes the date for valuing the interest to be acquired.



## Counter Notice

- Paras 19–29 of Schedule 15 allow for the service of a Counter Notice for certain properties within 28 days from the date of the Notice from the Acquiring Authority stating the effect of the GVD.
- Within three months of receipt of a Counter Notice, the Acquiring Authority can either:
  - Withdraw the Notice in respect of the land severed;
  - Serve a Notice noting that the GVD will apply to all of the land; or
  - Refer the matter to the Lands Tribunal.



# Compensation

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## Compensation

There are three main scenarios where financial compensation is payable by an Acquiring Authority, namely (1) where the whole of a property is acquired, (2) where part-only of a property is acquired and (3) where no part of a property is acquired, but it lies adjacent/close to the public work.







## Compensation

### Valuation dates:

1. Date of entry by way of acquisition by agreement.
2. Date of assessment (the date of the decision by the LTS) – rare.
3. Date of vesting by way of the issue of a GVD.



## Valuation Principles

The six main rules for valuation/assessment of compensation are set out in s12 of the Land Compensation (Scotland) Act 1963, although there a number of other rules and other Acts of Parliament as well as LTS decisions which together form the Compensation Code in the UK all under the concept of Equivalence i.e. the claimant, as far as money can, is to be left in no better and no worse a position after the CPO than before the CPO.



- **Rule 1** –No allowance shall be made on account of the acquisition being compulsory;
- **Rule 2** –The value of land shall [...] be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise;
  - Ignore the scheme
  - Development potential



## Valuation

- **Rule 3** – The special suitability or adaptability of the land or any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from [...] the requirements of any authority possessing compulsory purchase powers;



## Valuation

- **Rule 4** – Where the value of the land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the occupants of the premises or to the public health, the amount of that increase shall not be taken into account;



## Valuation

- **Rule 5** – Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the official arbiter is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement;



## Valuation

- **Rule 6** – “Disturbance” This element covers items such as:-
  - Increased operating costs
  - Professional fees and expense
  - Interest and charges
  - Adaptation
  - Removal costs
  - Loss of profits



## Valuation

- Home Loss Payments paid under the Land Compensation (Scotland) Act 1973 as amended by the Planning and Compensation Act 1991.
- Farm Loss Payments also within the 1973 Act – but rarely paid.
- Landlords (non-occupier) not usually entitled to a disturbance payment but they can get incidental costs under the 1991 Act.
- If claimant aged over 60, then no obligation to re-locate his/her business.
- Advance Payments of Compensation – multiple applications can be made: 90% of the Acquiring Authority's estimate of the likely compensation due.





## Part-Only Acquisitions

- Compensation payable for (1) land acquired, (2) Injurious Affection and (3) “disturbance” – however, the RAMAC case.
- Usually, “before and “after” valuations undertaken to determine the amount of compensation due and much better to “wait and see”.
- Provision of Accommodation Works – subject of a future training event!



## Material Detriment

- Arises in part-only acquisitions and, to a degree, is compulsory purchase in reverse.
- LTS decision in Morrison v Aberdeen City Council (2014) clarifies the concepts.
- Very tight timescales for issuing a valid notice and different approach between agricultural v non-agricultural property.



## Part 1 Claims

- No land acquired scenario but compensation payable under the 1973 Act if the value of the affected property is reduced due to the operation of the public work.
- One-year “holding period” following on from the Relevant Date before a claim can be lodged, then 5-years within which to lodge a claim.
- Compensation limited to only one or more of the seven physical factors as stated in the 1973 Act.
- Usually does not cover the full reduction in the value of the property and thus regarded as a “half-way house” measure.



# Lands Tribunal

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# LANDS TRIBUNAL





## Members



Lord Minginish



Ralph Smith



Andrew Oswald



Charles Marwick



## LTS Process

- LTS deals with a number of disputed compulsory purchase issues e.g. blight notices, material detriment as well as disputed compensation claims.
- LTS can deal with disputed compensation claims on a written representation basis- but rarely utilised as it requires the consent of all parties.
- Thus, normally, there is Hearing, which akin to a court hearing, and operated by QC and lawyers with expert witnesses called to give impartial evidence on the area(s) of dispute following the compilation of a Closed Record.
- Taking a claim to the LTS is both a time and cost-consuming exercise and rarely does the claimant recover all of his/her costs, even if successful.

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