The Housing, Communities and Local Government Committee

The effectiveness of current land value capture methods

Submission made by the Compulsory Purchase Association

Executive Summary

1. This submission represents the views of the national committee of the Compulsory Purchase Association (CPA). The CPA has in excess of 770 members representing all disciplines involved in the compulsory purchase process. Its members represent acquiring authorities, developers and affected landowners.

2. Whilst the CPA does not oppose the principle of land value capture, this submission focuses on the suggestion that compulsory purchase land valuation methodology could be used as a means of capturing more land value than it does currently. We strongly oppose this proposal.

3. The principal reasons for our opposition are:

   - We believe there may be a fundamental misunderstanding about how the existing statutory provisions provide for compensation to be assessed in practice.

   - The current statutory compensation framework ensures that

     i) compensation is very rarely paid to reflect the value of land with planning consent where that consent does not actually exist and

     ii) value which is attributable to the acquiring authority's scheme and/or associated transport infrastructure is excluded from compensation.

   - Even where planning consent does exist the current statutory provisions provide that the level of compensation paid must reflect and take in to account the prospect of that consent being implemented in the absence of the scheme that is being facilitated by the compulsory purchase order (CPO).

   - Not fully and fairly compensating landowners for losses they incur as a result of compulsory acquisition is unjust and contrary to one of the central principles of compulsory purchase law in this country.

   - While compulsory purchase can and does achieve land value capture in some circumstances, it is not its primary purpose. The economic benefits that arise from

compulsory acquisition have a far wider role to play in the delivery of land for infrastructure, regeneration and housing.

- Landowners facing undervalued compensation for their land would oppose CPOs more vigorously than at present, which would impose cost and delay to authorities seeking to secure compulsory purchase powers.

- Changes to the statutory compensation rules would risk creating a two tier land market. Any effective land value capture method should apply equally to all land, not just land subject to compulsory acquisition; which is only used in a minority of sites brought forward for housing.

- The changes to compulsory purchase law that are being suggested would not create the fairer, faster system envisaged by the 2017 Housing White Paper.

- A compulsory purchase system where landowners were paid less than the open market value of their land would run contrary to the approach adopted in other countries.

Introduction

4. The 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. The CPA has in excess of 770 members and spans a range of professional disciplines involved in the compulsory purchase process, including chartered surveyors, lawyers, barristers, forensic accountants, planners and land referencers. It is a non-partisan organisation and neither supports nor opposes specific public works schemes. The CPA's members represent both acquiring authorities and claimants affected by compulsory acquisition. The CPA is regularly asked by government departments to comment on proposed changes to the compulsory purchase and compensation system.

5. It should be recognised that the statements made in this submission reflect the consensus view of the CPA's national committee, but may not represent the views of all of its members.

6. The Committee's consultation will understandably encompass a wide range of potential land value capture methods, including, but not restricted to:

- SDLT receipts
- Business rates retention
- New specific charge on area relevant to a particular project
- CIL

- Section 106 contributions
- Affordable housing allocations
- Development rights auction model or other land pooling models
- The reform of compulsory purchase land valuation law

7. However, given the CPA's area of interest and expertise, this submission focuses on the last of these potential land value capture methods i.e. the possible reform of compulsory purchase land valuation law.

8. It should be noted that while this submission refers to Compulsory Purchase Orders (CPOs) the views we express apply equally to the assessment of compensation arising from the exercise of compulsory purchase powers under other statutory instruments, such a Hybrid Bills, Development Consent Orders, Demolition Orders and Transport and Works Act Orders. We refer to CPOs only as these are the instruments most commonly used to deliver regenerative development and housing.

Are current methods, such as the Community Infrastructure Levy, planning obligations, land assembly and compulsory purchase adequate to capture increases in the value of land?

9. The UK's compulsory purchase system is founded on the principle of equivalence. That principle requires a person who has had his land acquired compulsorily to be fully and fairly compensated for his/her loss, so that they are placed, as far as is possible in monetary terms, in the same position that they would have been but for the compulsory acquisition. The corollary of this is that a claimant is only entitled to losses fairly attributable to the taking of his land, but no greater amount.

10. For this reason Rule 2, Section 5 of the Land Compensation Act 1961 (the '1961 Act') provides that the compensation to be paid for land acquired compulsorily

"…shall, subject as hereinafter provided, be taken to be an amount which the land if sold on the open market by a willing seller might be expected to realise."

In other words, the market value of the land reflecting its condition and all relevant circumstances at the date of acquisition.

11. A Rule 2 valuation further assumes an unconditional purchase of land disregarding both the benefit and any blighting effects of the acquiring authority's 'scheme' and the use of compulsory purchase powers (the 'no-scheme principle'). A Rule 2 value therefore only permits the value that the owner could have received had he or she sold their land voluntarily

on the open market as if the acquiring authority's scheme (including any preparatory works it may have undertaken) and the CPO did not exist. It also precludes any assumption that any neighbouring land is being acquired at the same time to deliver the acquiring authority's scheme, or any other form of larger development.

12. Section 32 of the Neighbourhood Planning Act 2017 (which inserts new measures into the 1961 Act) has now tightened the controls on claiming value associated with the authority's scheme where that scheme is larger than the CPO area or comprises more than just one CPO. Section 32 also expressly confirms that all land included within an urban development area, a New Town Order, or a Mayoral Development Order should be taken to be part of the scheme that is disregarded for valuation purposes.

13. Section 32 further provides that transport infrastructure constructed to facilitate, or make possible, a development scheme can be disregarded under the no-scheme principle. This means, if a new train station or road were developed, at public expense, to bring about the development of an area, any improvements in land values that arose from that new train station or road would be disregarded for the purposes of assessing compensation under a CPO.

14. Under the 1961 Act, land will also only be valued with the benefit of planning permission if planning permission has already been granted, or if an express assumption of planning permission can be made pursuant to the statutory rules. In practice, the only circumstances in which a planning permission can be assumed to exist when it does not exist, is if that planning permission could have been obtained but for the proposed CPO scheme.

15. Even in circumstances where planning permission has been granted, or can be assumed for individual land holdings, all of the risks and uncertainties that might affect the delivery of development are to be taken into account when assessing compensation under Rule 2.

16 An example of how the statutory provisions work in practice can be found in the CPO used to deliver facilities for the 2012 Olympic Games and subsequent legacy regeneration at Stratford. Although the Olympic CPO has been cited by some as an example of where landowners were paid 'windfall' residential development values for industrial land under the statutory compensation rules, this is not correct. Members of the CPA, including the authors of this submission were involved in negotiating and settling Olympic CPO compensation claims and so have first-hand knowledge of the agreements reached.

17. A number of landowners who had land acquired by the Olympic CPO argued that because their land was in an area allocated for mixed-use development, including residential, their compensation should reflect residential land values. However, in the case of Clearun Limited

and Others v Greater London Authority (which was heard by the Upper Tribunal at the end of 2013), despite the parties agreeing that planning permission would have been granted just eighteen months after the Valuation Date, the Tribunal ruled that compensation for the value of Clearun's land should be assessed on the basis of existing use value, plus 15% to reflect its future development potential.

18. This was because, without the Olympic CPO, there was no certainty that the new transport and utilities infrastructure that was necessary to make development viable would have been provided in the short, or even medium, term. Furthermore, the wider area of land allocated for development was held in disparate ownership and occupied by a range of industrial businesses, many of which undertook processes that were incompatible with residential use. In the absence of a CPO there was no certainty over when these 'bad neighbour' businesses might relocate.

19. Another landowner, Rooff Limited, applied for a Certificate of Appropriate Alternative Development ('CAAD') in order to support its claim. Under a CAAD a planning permission which would have been granted, but for a CPO, can be assumed to exist. Although initially its application was rejected, after a long battle, Rooff was successful in securing a CAAD which confirmed compensation could be assessed on the assumption that planning permission for residential development would have been granted four years after the compensation Valuation Date. However, while it has been incorrectly reported that this meant Rooff then obtained full development value for its land, for the same reasons outlined with the Clearun case, Rooff ultimately accepted that its compensation should effectively represent existing use value, plus a premium to reflect future development potential.

20. All of the claimants who had been seeking full development for their land on the main Olympic Park site ultimately settled their claims on the basis of existing use value plus a relatively modest 'hope value' premium. The only location where higher values were paid was an area of land situated to the south of the main Olympic Park site where land was capable of immediate development. However, this represented only circa 1% of the total land area encompassed by the Olympic CPO.

21 In summary, the existing rules that govern the assessment of compulsory purchase compensation reflect the principle of equivalence and ensure that landowners are only paid the fair compensation they are due for the value of their land excluding any value improvements arising from the acquiring authority's scheme. Recent reforms in the Neighbourhood Planning Act 2017 have extended the scope of what can be included within the definition of the Acquiring Authority's Scheme. The existing system therefore already provides a framework within which public bodies can secure substantial economic benefits,

including the capture of land value, through the delivery of housing, regeneration and infrastructure for the wider public good.

What new methods may be employed to achieve land value capture and what examples exist of more effective practice in this area, including internationally?
What are the possible advantages and disadvantages in adopting alternative and more comprehensive systems of land value capture?

22. The CPA is aware of a number of suggested changes to the current statutory land compensation provisions. These include the Royal Town Planning Institute's ('RTPI's') proposal that all land acquired compulsorily should be acquired at 'existing use value' (including, it appears, land which has already been granted planning permission) and Shelter's, more restricted, proposal for 'New Home Zones' where no account would be taken of 'prospective planning permissions'. In detail, the Shelter proposals call for:

    1) An amendment to Section 14 of the Land Compensation Act 1961, so that when valuing land no account should be taken of any prospective planning permissions in New Home Zones.

    2) An amendment to Section 17 of the 1961 Act so that there could be no application for a CAAD in a New Home Zone.

23. Both RTPI's and Shelter's suggested changes seem to be based on the assumption that it is landowners subject to compulsory purchase who are the principle beneficiaries of value improvements created by public authority development proposals and/or the provision of publically funded infrastructure, rather than the public authorities themselves. However, for the reasons stated previously, this reflects a misunderstanding of the way in which the statutory compensation provisions operate. In practice, landowners rarely, if ever, receive so called windfall payments and are only compensated for the value of their land disregarding the acquiring authority's scheme.

24 The CPA believes the market value approach to the assessment of compensation should be protected and it would be both wrong and damaging to the provision of land for housing, infrastructure and regeneration to create a system where private individuals can have their property forcibly expropriated by the state without being paid the full measure of any loss they incur as a result. This would clearly run contrary to the principle of equivalence and any reform of the current system along the lines proposed by RTPI and Shelter would need to be carefully considered against human rights legislation.

25. It is not the underlying purpose of compulsory purchase powers to capture land value. While compulsory acquisition can undoubtedly provide significant financial benefits for society as a whole, including land value capture, its primary purpose is to facilitate the delivery of regeneration and infrastructure where that delivery would otherwise not be possible.

26. To use compulsory purchase as a tool to achieve land value capture would place pressure on authorities to compulsorily purchase housing land that might otherwise have been delivered by the market, solely to "confiscate" the uplift in value that might arise from the grant of planning permission. Because compulsory purchase compensation only reflects pre-existing value and not value created by an acquiring authority's scheme, the suggested changes to the compensation rules would only expropriate 'bona-fide' existing development value and not scheme generated value. Whether the compulsory purchase of land for this purpose would constitute a compelling case in the public interest is open to debate.

27. That compensation for land acquired compulsorily should reflect the value an owner could expect to obtain if he sold that land on the open market is a fundamental principle of compensation law. To remove this right would prevent landowners from receiving the value that their land would have had, but for the CPO scheme, whether that value would have been for housing, employment or any other purpose. The development value of a piece of land is as much a part of its genuine value as the value of "bricks and mortar" already on the land.

28. If windfall values relating to development rights are to be captured from owners, this should be done at the point that value is created, in the way it is in some other European countries. For example on allocation for housing in a Local Plan. To allow additional land value to be lawfully created, and then confiscated without compensation offends natural justice and the fundamental principle of compulsory purchase of land for public purposes – that an expropriated owner receives no more nor any less than his or her genuine loss.

29. The proposed changes would also indiscriminately penalise any land owner with development value, whether for housing or any other purpose, regardless of when the development prospects were created. Even if the land had been purchased at an increased value, in good faith, reflecting planning prospects that had already been created.

30. If the wider application of existing use value suggested by the RTPI were to be adopted, these penalties would not be limited to land compulsorily acquired for housing, but also for roads, railways, power networks and regeneration. Opposition to all these schemes could be expected to increase significantly leading to additional cost and delay to land assembly. Alternatively, if Shelter's New Home Zones were to be adopted, there would be a system where landowners subject to compulsory purchase for housing would be compensated on

one basis, while landowners whose land was acquired for infrastructure would be compensated on another basis. It is difficult to see how this approach could be justified.

31. Compulsory purchase powers are an onerous imposition on individuals, justified by a compelling case in the public interest and subject to payment of appropriate compensation for the loss imposed. Successive Governments have sought to promote the appropriate use of compulsory purchase powers for development in the public interest, and to reduce the time and cost associated with their use.

32. The Housing White Paper published on 7 February 2017 stated at paragraph 2.43,

"Compulsory purchase law gives local authorities extensive powers to assemble land for development. Through the Housing and Planning Act 2016 and the Neighbourhood Planning Bill currently in Parliament we are reforming compulsory purchase to make the process clearer, fairer, and faster, while retaining proper protections for landowners"

33. The amendments to the 1961 Act that are being suggested would fundamentally undermine the "proper protections for landowners" promised in the White Paper and result in a system that was neither fairer nor faster. Landowners facing lower compensation for their land would oppose CPOs more vigorously which may impose cost and delay to authorities seeking to secure powers. Under both RTPI's and Shelter's proposals it is also likely that a damaging two tier land market could develop. Land allocated for future development, or in a New Home Zone, facing the prospect of compulsory acquisition would see values depressed in the knowledge that land could be acquired at existing use value. However, land capable of development where there was no risk, or only a limited risk, of compulsory acquisition would continue to trade at something close to full development values. The knowledge that compulsory purchase compensation would be based on existing use value would only alter values where compulsory purchase powers were to be used.

34 Private sector developers would also be deterred from buying land and bringing forward development in areas where compulsory purchase was a risk. Rather than speed the process of new housing delivery, this could slow the pace of new development in some locations.

35. If a method of land value capture is required, whether this is through changes to the planning system through Section 106, CIL, or through a Development Rights Auction Model or other means, the intervention should not be reliant on the compulsory acquisition of land. Land Value Capture should equally apply to all land and not just that subject to compulsory acquisition. If an adopted Land Value capture methods had the effect of reducing land values

generally, this would also reduce compulsory purchase compensation, which is based on open market values.

36. The compulsory purchase system could then perform its proper role – bringing forward land for development in the public interest where this cannot be done by agreement in the open market. To do this effectively it must provide the promised "proper protections for landowners" and implement the clearer, fairer, faster system that is being delivered through recent reforms in the Localism Act 2011, Housing and Planning Act 2016 and the Neighbourhood Planning Act 2017.

37. The suggested changes to the 1961 Act would fundamentally undermine a system that has developed over 170 years around the concept of proper compensation for the acquired owner's loss and would not provide an effective or comprehensive solution to land value capture. They would also disrupt the delivery of land for infrastructure and regeneration by increasing the level of opposition to the use of compulsory purchase powers by any landowner whose land carried, lawful development value which would not be compensated on the forced acquisition of their land.

38. In attempting to justify a compulsory purchase system where landowners might not be paid compensation based on the open market value of their land, some supporters of change to the current compensation system refer to the delivery of housing in other European Countries such as the Netherlands and Germany. However, the comparisons they draw are potentially misleading and do not reflect systems where landowners subject to compulsory acquisition are paid less than the full open market value of their land. The CPA is unaware of any system of compulsory land acquisition in the western world where the payment of open market value to dispossessed landowners is not a fundamental principle.

39. In the Netherlands when land is acquired by public authorities for development at close to agricultural values, this is because it is assigned for purchase before value is added through planning designation. The Dutch Expropriation Act provides for the payment of full compensation for all damages directly or necessarily suffered as a result of the loss of property. Similarly, the principle of equivalence is central to the German compensation system and this requires the payment of open market value for land acquired. The German *Umlegung* (Apportionment) approach to land assembly, which has been held up as a model which could be adopted in this country, has at its heart the so called Right of Surrogacy, where private rights to property are preserved and a landowner is allocated land of equivalent size or value to that he owned prior to land assembly.