

The Law Commission
Consultation Paper No 165 (Overview)

**TOWARDS A COMPULSORY
PURCHASE CODE:
(1) COMPENSATION**

An Overview

London: TSO

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This Overview of the Consultative Report, completed on 24 June 2002, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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It would be helpful if, where possible, comments sent by post could also be sent on disk, or by e-mail to the above address, in any commonly used format.

It may be helpful, either in discussion with others concerned or in any subsequent recommendations, for the Law Commission to be able to refer to and attribute comments submitted in response to the Consultative Report. Any request to treat all, or part, of a response in confidence will, of course, be respected, but if no such request is made the Law Commission will assume that the response is not intended to be confidential.

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THE LAW COMMISSION

**TOWARDS A COMPULSORY PURCHASE
CODE: (1) COMPENSATION**

AN OVERVIEW

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PART I

COMPULSORY PURCHASE

COMPENSATION: AN OVERVIEW

INTRODUCTION

- 1.1 The Law Commission publishes simultaneously with this Overview a Consultative Report on Compulsory Purchase Compensation¹. This is the first of two papers in which we review the existing law of compulsory purchase and seek to indicate a way forward to enactment of a new Compulsory Purchase Code. The second paper (to be published early autumn 2002) will focus on Compulsory Purchase Implementation.
- 1.2 The main Report contains a detailed, and necessarily lengthy, analysis of the present law in England and Wales and in a number of comparable foreign jurisdictions, and then invites comment on a range of provisional proposals for reform involving simplification, consolidation and codification of the law.
- 1.3 The purpose of this Overview is twofold: first, to provide a guide and commentary for readers of the Consultative Report, who may find it helpful to read this Overview before embarking on the Report itself. Secondly, it is designed to set out the substance of our proposals and serve as a summary of the principal policy issues which flow from our examination of the workings of the compensation system. Inevitably that commentary will be brief and readers are invited to read the fuller arguments in the main Report.
- 1.4 Taken together the proposals we have formulated are intended to indicate the possible shape of a Code but are not in the form of draft legislation. The consultation responses will be taken into account in the proposals in our Final Report. The precise terms of any legislation will be a matter for Parliamentary Counsel in due course. The issues summary has been designed to cross-refer to the individual proposals, and to the consultation questions on which we would value responses. We are hoping that consultees will give practical examples of areas which presently give rise to confusion and where simplification is required. We are also conscious that in some instances valuation practice has run ahead of the law and we welcome views as to how far such practices should be reflected in the new Code (and as to the likely cost of doing so). The proposals themselves carry cross-references to discussion sections in the main Report.

SCOPE OF THE PROJECT

- 1.5 In July 2001 the Lord Chancellor approved terms of reference for the Law Commission which required us to review the law relating to:
 - (1) The implementation of compulsory purchase orders;

¹ Law Commission Consultative Report published in the Consultation Paper series as LCCP No 165, *Towards a Compulsory Purchase Code: (1) Compensation*, hereafter "LCCP 165".

- (2) The principles for the assessment of compensation on the acquisition of land (and, more particularly, the rules relating to disregard of change in value caused by an acquisition scheme);
- (3) Compensation where compulsory purchase orders are not proceeded with;
- (4) Compensation for injurious affection (both where land is taken and where it is not).

The first Report addresses aspects (2) and (4) in this list; implementation issues and abortive orders are to be dealt with in our second Report.

- 1.6 The reference arose out of the Final Report of the Compulsory Purchase Policy Review Advisory Group (“CPPRAG”) published in July 2000,² which recommended the preparation of new legislation in consultation with the Law Commission. In March 2001 we published a preliminary Scoping Paper³ which proposed a framework and programme for work. That was followed by a Discussion Paper published in October 2001 which focussed on the “no-scheme” rule.⁴ That paper and its accompanying seminar generated much useful comment and material which we have considered at length. We are most grateful to the many people who, both individually and through working groups, have contributed to our emerging work in this field.
- 1.7 Concurrent with our work on LCCP 165, the DTLR (as successor to the DETR) published in December 2001 a major Green Paper on changing aspects of the planning system (particularly strategic planning for development)⁵ and a series of daughter documents, one of which focussed on reform of the system of compulsory purchase and compensation.⁶ This latter document set out a raft of provisional proposals by Government for legislative and procedural change. Consultation on those proposals ended in March 2002 and, having evaluated the responses, Government is shortly to publish an Implementation Policy Statement setting out its preferred route. The Law Commission has sought, in its present consideration of compensation, to take on board the thrust of developing Government policy where that impacts on specific areas of proposal.
- 1.8 In this Overview we comment on the main points arising from the draft Proposals in LCCP 165. We tackle that by:

- (1) Setting out in Part II the Code Proposals;

² *Fundamental review of the laws and procedures relating to compulsory purchase and compensation: Final report* (DETR July 2000).

³ *Compulsory Purchase and Compensation: A Scoping Paper* (Law Commission March 2001).

⁴ *Compulsory Purchase and Compensation: Disregarding “the Scheme”: A Discussion Paper* (Law Commission October 2001).

⁵ *Planning: delivering a fundamental change* (DTLR December 2001).

⁶ *Compulsory Purchase and Compensation: delivering a fundamental change* (DTLR December 2001). We refer to this document, in the present Overview and the Consultative Report, LCCP 165, as the Policy Statement. It contains Government’s provisional proposals. The Government’s final proposals will appear in an Implementation Policy Statement (July 2002).

- (2) Summarising in Part III (Notes on Proposals) the issues which arise and our approach to devising solutions;
- (3) Setting out in Part IV a series of Consultation Questions which flow from our work (and upon which we would appreciate comment and guidance);
- (4) Producing an Appendix which summarises two illustrative cases. The first case illustrates the application of the present rules relating to disregard of the “scheme” and betterment, in compensation assessment under the compulsory purchase procedure. The second (by way of comparison) illustrates assessment under a code without those rules.⁷

The Notes on Proposals starts with general definitions, moves through discussion of Proposals 1 to 18 (including repeals), and concludes with an indication of the matters excluded from the LCCP 165.

1.9 In the text we use the following abbreviations for English statutes:

‘1845 Act’ – Land Clauses Consolidation Act 1845

‘1946 Act’ – Acquisition of Land (Authorisation Procedure) Act 1946

‘1961’ Act – Land Compensation Act 1961

‘1965 Act’ – Compulsory Purchase Act 1965

‘1972 Act’ – Local Government Act 1972

‘1973 Act’ – Land Compensation Act 1973

‘1976 Act’ – Local Government (Miscellaneous Provisions) Act 1976

‘1980 Act’ – Local Government, Planning and Land Act 1980

‘Acquisition Act’ – Acquisition of Land Act 1981

‘Vesting Declarations Act’ – Compulsory Purchase (Vesting Declarations) Act
1981

‘1990 Act’ – Town and Country Planning Act 1990

‘1991 Act’ – Planning and Compensation Act 1991

‘1992 Act’ – Transport and Works Act 1992

‘1998 Act’ – Human Rights Act 1998

⁷ Compulsory wayleaves under the Telecommunications Act 1984.

PART II

THE COMPENSATION CODE – THE PROPOSALS

INTRODUCTION

- 2.1 We set out below our provisional Proposals for the matters to be included in the new Compensation Code. We have done this in the form of draft “Proposals”, in order to give a sense of the shape of the new Code. However, it must be emphasised that the formulation of these Proposals is intended solely to give an indication of the proposed content of the Code; the detailed drafting will be a matter for Parliamentary Counsel in due course. Where, however, we have derived these formulations from sources other than the main provisions of the existing statutory provisions, we have indicated the source in a footnote.
- 2.2 The draft proposals are set out under the following main headings:
- (a) General definitions
 - (b) Core principles
 - (c) Project disregard and planning status
 - (d) Miscellaneous rules
 - (e) Injurious affection where no land is taken.
 - (f) Repeals

Within the body of the proposals we show, in italics, cross-references to relevant discussion in the main text of the full Consultative Report, LCCP 165.

(A) GENERAL DEFINITIONS

In these proposals, the following terms are used as here defined:

“Compulsory purchase”: means the compulsory purchase of any land under powers conferred by or under any statute;

“The authority”: means the minister, authority or other person authorised to acquire land by compulsory purchase;

“The claimant”: means a person claiming, or entitled to claim, compensation under this Code;

“Subject land”: means any land of the claimant which is subject to compulsory purchase;

“Retained land”: means any interest of the claimant in land (not subject to compulsory purchase) which, at the date of notice to treat, was held with¹ the claimant’s interest in the subject land;

“First notice date”: means the date on which notice of the making of the compulsory purchase order is first required to be published or served, in accordance with the requirements of the relevant Act;²

[See Part IV, para 4.65]³

“Date of notice to treat”: means the date of the notice required (under 1965 Act, s 5) to be served, following confirmation of the compulsory purchase order, on owners of interests which the authority wishes to acquire; or the date of a “deemed notice to treat” under other procedures (such as the vesting declaration procedure⁴).

“Valuation date”: means the date on which the authority takes possession of the subject land (or, under the vesting declaration procedure, the vesting date⁵), or (if earlier) the date of agreement or determination of compensation.

[See Part V, paras 5.73-5.74]

(B) CORE PRINCIPLES

PROPOSAL 1: RIGHT TO COMPENSATION

Subject to the provisions of the Code, any person from whom an interest, in existence at the date of notice to treat, is acquired by compulsory purchase, or whose interest in the subject land is diminished or adversely affected by or pursuant to compulsory purchase, is entitled to compensation assessed in accordance with the following rules.

[See Part IV, para 4.2-4.4]

¹ The requirement that the retained land should be “held with” the subject land is established by case law under 1965 Act, s 7. It means simply that the pieces of land should be so related that “the possession and control of each gives an enhanced value to them all”: *Cowper Essex v Acton Local Board* (1889) 14 App Cas 153, per Lord Watson.

² Cf 1961 Act, s 22(2)(a), which adopts a similar definition, as the date of the “proposal to acquire” (for the purposes of certificates of appropriate alternative development). In most cases, the requirements to give notice of the making of the order are in the Acquisition of Land Act 1981, or regulations made thereunder: see 1981 Act, s 11, and Compulsory Purchase of Land Regulations 1994, SI 1994, No 2145.

³ This is a cross-reference to the relevant discussion in the main text of the full Consultative Report, LCCP 165.

⁴ See Vesting Declarations Act 1981, s 7(3), by which the 1961 Act is applied “as if” a notice to treat had been served on the date of execution of the vesting declaration; this is referred to as a “deemed” notice to treat (cf *ibid*, s 10(3); 1961 Act, s 22(2)(b)). “Deemed” notices to treat also arise under the purchase notice and blight notice procedures: Town and Country Planning Act 1990, ss 143(1), 154(2).

⁵ See Vesting Declarations Act 1981, s 10.

PROPOSAL 2: HEADS OF COMPENSATION

The right to compensation shall be a right to an amount (not less than nil), assessed in accordance with the principle of fair compensation, having regard to the following matters (as defined below): market value of the subject land; disturbance; injury to retained land (severance or injurious affection, less betterment); (where applicable) equivalent reinstatement.

[See Part IV, paras 4.6-4.14]

PROPOSAL 3: MARKET VALUE

(1) “Market value” of any land means the amount (not less than nil) which the land might be expected to realise if sold in the open market by a willing seller to a willing buyer.

(2) Except as otherwise provided, for the purpose of any provisions of the Code which depend on the value of land (including any reduction or increase in the value of land), value means “market value” as so defined.

[See Part IV, paras 4.15-4.19]

PROPOSAL 4: DISTURBANCE

(1) “Disturbance” means any monetary loss or expense, not directly based on the value of land, suffered or incurred by the claimant and fairly attributable to displacement⁶ in consequence of the compulsory acquisition of the subject land;

(2) Without prejudice to the generality of (1), in assessing compensation for disturbance, the following rules apply:

(a) All relevant circumstances are to be taken into account, including any circumstances personal to the claimant;

(b) Disturbance includes the amount of any legal or other professional costs reasonably incurred by the claimant in connection with the acquisition;

(c) Where compensation is claimed on the basis of the relocation of a business from the subject land, compensation on the relocation basis shall not be refused solely because it exceeds the compensation which would be payable on the extinguishment basis,⁷ unless, in the opinion of

⁶ Cf Land Compensation Act 1973, Part III, ss 29, 34 and 37.

⁷ See generally the *Shun Fung* case [1995] 2 AC 111. The “relocation basis” assumes that the owners of the business are able to relocate it; compensation will normally cover the costs of relocation and any temporary losses. The “extinguishment basis” assumes that the business is closed down; compensation is based on the value of the business. In most cases, relocation will be the preferable option for both parties; but provision needs to be made for those cases where the claimant wishes to relocate, even though total extinguishment would be the cheaper option for the authority.

the Tribunal, it is unreasonable in all the circumstances (including the cost to the authority and the value of the business to the claimant) to assume relocation of the business;

(d) Compensation for disturbance may, if the Tribunal so determines, include costs reasonably incurred in replacing buildings, plant or other installations (whether or not on the land acquired) where (i) they are required for a business to be continued on the retained land; (ii) the need for replacement is fairly attributable to the acquisition, and is reasonable in all the circumstances ((having regard to the cost to the authority and to the likely benefit to the claimant); (iii) the cost is not adequately reflected in any other head of compensation; but (iv) subject to such deduction (if any) as the Tribunal may determine should be made to reflect any improvement in the facilities so obtained over those replaced;

(e) Compensation for disturbance is not payable for loss or expense suffered or incurred before the first notice date;

(f) Where a claimant who was not in occupation of the subject land incurs incidental charges or expenses in acquiring, within one year of the date of entry, an interest in other land in the United Kingdom, those charges and expenses may be claimed as disturbance;⁸

(3) Without prejudice to (2)(a), the rights of traders over 60 years of age to claim compensation on the total extinguishment basis, in the circumstances defined by the 1973 Act, s 46, will be preserved in the new Code.

[See Part IV, paras 4.20-4.68]

PROPOSAL 5: INJURY TO RETAINED LAND

(1) Compensation for injury to retained land is to be assessed having regard to the following so far as applicable, assessed (subject to (5) below) at the valuation date:

(a) “Severance”, defined as the amount of any reduction in the market value of any interest of the claimant in any retained land, attributable to its severance from the subject land;

(b) “Injurious affection”, defined as the amount of any reduction in market value of any interest of the claimant in the retained land attributable to the nature of, or the carrying out of, the relevant project;⁹

⁸ This is intended to reproduce 1961 Act, s 10A.

⁹ The wording is derived from s 55(2)(a)(iv) of the Lands Acquisition Act 1989 (Cth) (“LAA (Cth)”), the Australian federal statute, which was based on recommendations of the Australian Law Reform Commission (“ALRC”) Report, No 14 (1980).

(c) “Betterment”, defined as any increase in the market value of the retained land attributable to the nature of, or the carrying out of, the relevant project;

(d) The “relevant project” shall have the same meaning as in Proposal (8) below.

(2) Compensation under this Proposal is to be assessed by taking the amount of any severance or injurious affection, and deducting the amount of any betterment (save that the total shall not be less than nil);

(3) In assessing injurious affection or betterment, regard is to be had to the effects of the whole of the works comprised in the relevant project, whether on the subject land or elsewhere;¹⁰

(4) If the claimant so requires, the amount due under this Proposal is to be assessed by calculating the difference at the valuation date between (a) the market value of the subject land and the retained land taken together (disregarding any diminution due to the relevant project) and (b) the market value of the retained land on its own (taking account of any effect on that value of the relevant project).

(5) Where the injury for which compensation is claimed under this proposal is temporary in nature, injurious affection shall be assessed by reference to any reduction in letting value of the retained land during the relevant period, or such other method as the Tribunal may consider appropriate.

[See Part V, paras 5.2-5.35]

PROPOSAL 6: EQUIVALENT REINSTATEMENT

(1) Subject to (2), where (a) the subject 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, and (b) reinstatement in some other place is genuinely intended, compensation shall (at the option of the claimant) be assessed on the basis of the reasonable cost of equivalent reinstatement.

(2) Compensation on this basis may be refused by the Tribunal, if satisfied that it is in all the circumstances unreasonable, having regard to the cost to the authority and to the likely benefit to the claimant.

(3) Compensation on the equivalent reinstatement basis shall, at the election of the claimant, be paid in the circumstances set out in 1973 Act, s 45 (dwellings especially adapted for the disabled).

[See Part V, paras 5.36-5.54]

¹⁰ The latter words are intended to preserve the effect of 1973 Act, s 44, which reversed previous case law under which only the works on the subject land could be taken into account.

PROPOSAL 7: INCIDENTAL RULES

(1) Where an interest is limited as to time or may be terminated by another person, regard shall be had (in assessing compensation for that or any other interest in the subject land) to the likelihood (in the absence of the relevant project) of the continuation or renewal of the interest and the likely terms and conditions on which any continuation or renewal would be, or would have been, granted.¹¹

(2) Where the subject land comprises a dwelling-house, there shall be left out of account any increase or reduction in the compensation otherwise payable, which is attributable to the fact that the authority (or any other public authority) have provided or undertaken to provide alternative residential accommodation for the claimant or a residential tenant (under the 1973 Act, s 39 or otherwise).¹²

(3) There shall be disregarded any increase in the value of the land caused by its use in a manner, or for a purpose, contrary to law.¹³

(4) There shall be disregarded:

(a) any new interests created over the subject land, or the retained land, between the date of notice to treat and the valuation date, in so far as they would increase the amount of compensation otherwise payable by the authority;¹⁴

(b) without prejudice to (a), any enhancements (by creation of interests, or works on the land or otherwise) where the Tribunal is satisfied that the enhancement was not reasonably necessary and was undertaken with a view to obtaining compensation or increased compensation.¹⁵

(5) Where the market value of an interest in the subject land is assessed on the basis that the land had potential to be developed or used for a purpose other than the purpose for which it was occupied at the valuation date, compensation shall not be allowed under other heads (disturbance or injury to retained land) in respect of loss or damage that would necessarily have arisen in realising that potential.¹⁶

(6) If it is shown that the claimant has failed (since the first notice date) to take action reasonably open to him to mitigate his loss, the compensation

¹¹ Based on LAA (Cth), s 55(2)(d), and 1973 Act, ss 47-8.

¹² Cf 1973 Act, s 50.

¹³ Based on LAA (Cth), s 60(b).

¹⁴ This gives effect to a judicial rule: see *Mercer v Liverpool St Helens Ry Co* [1903] 1 KB 652.

¹⁵ Based on Acquisition of Land Act 1981, s 4.

¹⁶ Based on LAA (Cth), s 57.

otherwise payable shall be reduced by the amount of such loss as could have been avoided by taking such action when it was reasonable to do so.¹⁷

[See Part V, paras 5.56-5.70]

PROPOSAL 8: DATE OF ASSESSMENT

(1) Save as otherwise provided, and subject to Proposal 7(4) above and Proposals 9 and 10 below, interests will be valued as they stand at the “valuation date”, at values prevailing at that date, and in the context of the planning and other circumstances prevailing at that date.

(2) Where compensation is assessed on the basis of equivalent reinstatement, it will be assessed by reference to the the date at which reinstatement became reasonably practicable.

[See Part V, paras 5.71-5.91]

(C) PROJECT DISREGARD AND PLANNING STATUS

PROPOSAL 9: DISREGARDING THE PROJECT

(1) The existing rules, statutory or judge-made, relating to disregard of “the scheme” will be replaced by a new statutory set of rules, by reference to the “relevant project”;

(2) In this and the following proposal:

(a) “The relevant project”: means the project for the purpose of which the authority has been authorised (under the applicable statute) to acquire the subject land;

(b) “Planning status”: means the planning permissions, actual or assumed, relating to the subject land or other land, to be taken into account for the purpose of assessing compensation;

(c) “The cancellation assumption”: means the assumption that the relevant project was cancelled on the first notice date, with no prospect of that, or any other project to meet the same or substantially the same need, being carried out thereafter under statutory powers;¹⁸

(d) “Planning hope value”: means any increase in value of the subject land derived from the prospect of planning permissions being granted at a date subsequent to the valuation date;

¹⁷ The “duty to mitigate” is most relevant to disturbance (see *Shun Fung* case [1995] 2 AC at 126), but could in principle apply to other heads of claim.

¹⁸ Cf the “cancellation approach”: *Fletcher Estates Ltd v Secretary of State* [2000] 2 AC 307. See also *Grampian RC v Secretary of State for Scotland* [1983] 1340, 1345-6; and 1961 Act, ss 5-8.

(e) “Blighted land”: means land falling within one of the categories of planning proposals defined by Schedule 13 of the Town and Country Planning Act 1990 (or any replacement thereof);

(f) Any reference to the value of land includes a reference to the profitability of a business on that land;

[(2A) (i) If the authority wishes to contend that the relevant project extends to land other than the subject land, they shall include in the notice of the order a statement (in prescribed form) certifying that fact, defining the nature, extent and purpose of that project, and the date of the resolution of authorising that project;

(ii) Where such a statement is included in the order, its contents may be challenged by the claimant (but not the authority) on the hearing of a reference to determine compensation;

(iii) Subject to (ii), in any proceedings before the Tribunal:

(a) The relevant project shall be as defined in the statement under (i);

(b) The cancellation assumption shall be applied taking (instead of the first notice date) the later of the resolution date defined under (i) and the date three years before the first notice date;

(c) If no statement is served, it will be assumed (against the authority, but not the claimant) that the relevant project is confined to the area of the compulsory purchase order, and began on the first notice date.

As an alternative to (ii), an interested person could have the right to challenge the statement by objection to the confirming authority, within the time prescribed for objections to the order, and the decision of the confirming authority would then be binding on both parties before the Tribunal.¹⁹

(3) In assessing compensation there shall be disregarded:

(a) any increase in value of the subject land fairly attributable to the carrying out of, or the proposal to carry out, the relevant project;

(b) any decrease in value of the subject land fairly attributable (i) to the carrying out of, or the proposal to carry out, the relevant project, or (ii) to any prior indication of the proposal to carry out that project, or (iii) to the subject land being within a category of “blighted land”;

¹⁹ See Part III, para 3.17 below and Consultative Report, LCCP 165, paras 7.13 to 7.17 for discussion of this alternative mechanism.

(4) The increase to be disregarded under (3) shall be assessed by comparing the value of the land at the valuation date with the value as it would have been at that date on the cancellation assumption.

(5) The following rules apply where land is treated as having been subject to compulsory purchase, under procedures initiated by the claimant (“deemed compulsory purchase”):

(a) If the deemed compulsory purchase follows service of a blight notice²⁰ under the Town and Country Planning Act 1990, the relevant project shall be determined by reference to the planning proposal (as defined in Section 149 and Schedule 13 of that Act) by which the land became blighted land;

(b) In any other case (including the service of a purchase notice under section 137 of that Act), the relevant project shall be assumed to be the service by the claimant of the notice which initiated the procedure;

(c) In either case the “first notice date” shall be taken as the date of service of the notice which initiated the procedure;

(6) Nothing in this proposal shall be taken as altering (for valuation purposes) the planning status of the subject land or any other land.

[See Parts VI and VII, paras 7.1-7.28]

PROPOSAL 10: PLANNING STATUS

(1) The following rules will apply for the purpose of determining planning status at the valuation date:

(a) Account is to be taken of any planning permissions in existence at the valuation date (on the subject land or any other land);

(b) Planning permission is to be assumed (so far as not in existence at the valuation date) such as would permit the carrying out of the relevant project (on the subject land and any other land comprised in the project);

(c) Planning permission is to be assumed for any development (on the subject land or any other land) such as would reasonably have been expected to be granted not later than the valuation date, on the cancellation assumption;

(d) No other assumptions are to be made as to the existence of any planning permissions at the valuation date, but this rule does not prevent account being taken of any planning hope value.

²⁰ As defined in Town and Country Planning Act 1990, s 149(5).

(2) For the avoidance of doubt, in relation to any permission assumed under this Proposal:

(a) the assumption that permission has been granted does not of itself imply any assumption that work has been or will be carried out, or expenditure incurred, in implementing the permission;

(b) regard shall be had to any costs or expenses which would reasonably have been expected to be incurred in obtaining or implementing the permission; or in complying with any conditions, obligations or requirements to which the permission was, or would reasonably have been expected to be, subject.

(3) For the purpose of determining the permission or permissions to be assumed under (1)(c) above, either the claimant or the authority may, at any time after the first notice date, apply to the local planning authority for a “planning status certificate”, in accordance with the following rules (and “procedural regulations” to be made by statutory instrument):

(a) A planning status certificate is a certificate stating the opinion of the local planning authority as to the development (if any) on the land comprised in the application for which planning permission would reasonably have been expected to be granted on the cancellation assumption;

(b) The application for a certificate may relate to the subject land or any part of it, and any adjoining land which could reasonably have been expected to be part of the same development (whether or not in the ownership or control of the claimant);

(c) The certificate should include:

(i) Where permission would reasonably have been expected at some future date, an indication of the date;

(ii) A general indication of any conditions, obligations or requirements, to which the permission would reasonably have been expected to be subject;

(d) Either:²¹

(A) There shall be a right of appeal against the certificate to the Secretary of State, by either the claimant or the authority (based on the present right under 1961 Act, s 18ff); or

(B) There shall be a right of appeal against the certificate to the Tribunal, by either the claimant or the authority, subject to

²¹ These are put forward as alternative options for the Code, depending on which avenue of appeal is adopted. See Part III, para 3.27(5) below.

procedural regulations, and any time-limits there laid down; the regulations will give the Tribunal a wide discretion as to the timing and nature of the hearing of the appeal, having regard to any related compensation reference; in particular the Tribunal may direct:²²

(i) that the appeal be determined on its own, or at the same time as a reference relating to the determination of compensation for which the certificate is required;

(ii) that the hearing of the appeal should take the form of a local inquiry before a planning inspector (appointed for the purpose by the Chief Planning Inspector), and that the inspector be given delegated power to determine the appeal on behalf of the Tribunal;

(e) In determining compensation:

(i) the Tribunal must take account of any permission, which is to be assumed in accordance with the planning status certificate;

(ii) in deciding (under the above rules) whether any other permission is to be assumed at the valuation date, it must have regard to any contrary opinion expressed in the certificate;

(f) Regulations may provide for the certificate procedure to be applied (with or without modifications) to special cases, including:

(i) where an offer is made by the authority, before the first notice date, to negotiate for the purchase of an interest in land which is, or may be, subject to compulsory purchase;²³

(ii) where a claimant is absent from the United Kingdom or cannot be traced.²⁴

[See Part VIII, paras 7.30-7.45]

(D) MISCELLANEOUS RULES

PROPOSAL 11: INTERFERENCE WITH EASEMENTS ETC.

(1) Where the carrying out of the purpose for which the subject land is acquired results in interference with, or breach of, any easement, restrictive covenant or other right affecting the subject land, which is

²² Under the present rules, which give a right of appeal to the Secretary of State, there is provision for the validity of his decision to be challenged on legal grounds in the High Court: 1961 Act, s 23. This would be unnecessary under this proposal, since the Tribunal's decision would be subject to the ordinary right of appeal to the Court of Appeal.

²³ Cf 1961 Act, s 22(2)(c).

²⁴ Cf 1961 Act, s 19.

attached to other land, compensation shall be payable under this Proposal.

(2) Compensation under this proposal shall be assessed by reference to the reduction (if any) in the market value of the land to which the right is attached, so far as attributable to such interference or breach.²⁵

[See Part VIII, paras 8.3-8.9]

PROPOSAL 12: ACQUISITION OF RIGHTS

Where the interest acquired is a right over land (including a newly created right):

- (i) The value of the right shall be assessed by reference to the depreciation, if any, in the market value of the land over which the right is acquired;**
- (ii) Other heads of compensation (disturbance, injurious affection but not severance) shall be allowed under the ordinary rules (see above).**

[See Part VIII, paras 8.10-8.20]

PROPOSAL 13: ADVANCE PAYMENTS

The claimant shall be entitled to an advance payment on account of compensation and interest, in accordance with sections 52 and 52A of the 1973 Act (which will be incorporated into the Code), subject to the following:

- (i) Section 52(6) will be amended so that, whether or not the mortgage exceeds 90% of the authority's estimate, the authority shall, if so requested by the owner and mortgagee, make the advance payment direct to the mortgagee;**
- (ii) Where it is shown that the authority has delayed unreasonably in making such a payment, or that the estimate on which the payment was based was unreasonably low,²⁶ the County Court may, on the application of the claimant, may make such interim or final orders (including imposing time-limits), as are necessary to enforce the authority's obligations under this proposal.**

[See Part VIII, paras 8.21-8.29]

²⁵ This is intended to reproduce the effect of 1965 Act, s 7, as applied to interference with such rights: see *Wrotham Park Estate Co v Parkside Homes* [1974] 1 WLR 798. It is to be noted that s 7 also applies to works on land acquired by agreement (see *Re Elm Avenue, New Milton* [1984] 1 WLR 1398); further provision will be needed, in this Code or elsewhere, to ensure that this effect is preserved. Issues relating to the continued existence of the rights following payment of compensation will be considered in the Law Commission's Consultation Report on Implementation (Autumn 2002).

²⁶ The word "unreasonably" is intended to be interpreted in accordance with judicial review principles; the County Court is not expected itself to take over the function of making the estimate.

PROPOSAL 14: LANDS TRIBUNAL JURISDICTION

The Lands Tribunal shall have jurisdiction (subject to procedural rules) to determine any claim (common law or statutory) relating to damage to land or to the use of land, where it arises out of substantially the same facts as a compensation claim which has been referred to the Tribunal.

[See Part VIII, paras 8.30-8.32]

PROPOSAL 15: INTEREST

Interest on compensation, in respect of the compulsory purchase of any land on which entry has been made before payment of compensation, shall be paid from the date of entry at such rate as may be prescribed from time to time under 1961 Act, s 32 or any replacement.²⁷

[See Part VIII, paras 8.33-8.48]

PROPOSAL 16: SUBSEQUENT PLANNING PERMISSION

1961 Act, s 23 (compensation where permission for additional development is granted after acquisition) will be repealed.

[See Part VIII, paras 8.65-8.75]

(E) INJURIOUS AFFECTION WHERE NO LAND IS TAKEN

PROPOSAL 17: COMPENSATION FOR EFFECTS OF PUBLIC WORKS

Part I of the Land Compensation Act 1973 will be expanded and amended to provide a complete code for compensation for injurious affection where no land is taken:

(1) A new provision of the 1973 Act (to replace 1965 Act, s 10) will confer a right to compensation where the market value of an interest in land is depreciated by “physical factors” caused by the *construction* of “public works”,²⁸ but only to the extent that a claim would have arisen at common law apart from the immunity conferred by the statute.

(2) The 1973 Act, Part I (compensation for depreciation due to the *use* of public works) will be retained, subject to the following:-

(a) Repeal of:

²⁷ The rates prescribed under 1961 Act, s 32 are applied under a number of other statutes (see Consultative Report, LCCP 165, para 8.36). It is open for consideration whether it is preferable to retain that section, or replace it in the new Code, making such consequential amendments as are necessary. A decision on this point should in any event await the forthcoming Law Commission’s Report on the award of Compound Interest, which may affect the form of any replacement.

²⁸ “Physical factors” and “public works” will be defined as in 1973 Act, s 1.

(i) section 2(3) and (6) (rateable value limit of £24,600, currently applicable to interests other than dwellings or agricultural units);

(ii) section 4(5) (existing use only);

(iii) section 5 (requirement to assume that no permission would be granted for new development).²⁹

(b) Other detailed amendments proposed by CPPRAG to be reviewed following consultation.

[See Part IX]

(F) REPEALS

PROPOSAL 18: REPEALS

REPEALS

(1) The above provisions are to replace the following existing statutory provisions, which will accordingly be repealed:

Land Compensation Act 1961

ss 5-9, 10A, Sched 1 (rules for determining amount of compensation)

ss 14-16 (planning assumptions)

ss 17-22 (certificates of appropriate alternative development)

ss 23-30, Sched 3 (compensation for additional development)

Compulsory Purchase Act 1965

s 7 (compensation for severance etc)

s 10 (injurious affection where no land is taken)³⁰

Land Compensation Act 1973

s 2(3) and (6) (rateable value limit of £24,600)³¹

s 4(5) (existing use only)³²

²⁹ Section 5(3) which, exceptionally allows permission to be assumed for so-called “Third Schedule” development, would become redundant.

³⁰ Also the equivalent provisions of the 1845 Act (ss 63 and 68).

³¹ See Proposal 17(2)(a)(i).

s 5 (requirement to assume that no permission would be granted for new development)³³

s 44 (injurious affection by the whole of the works)³⁴

s 45 (disturbance provisions for the disabled, and over 60s)³⁵

ss 47-8 (continuation of business and agricultural tenancies)³⁶

s 50 (compensation where occupier is rehoused)³⁷

s 51 (designation in new town for public development)³⁸

ss 52, 52A (advance payment)³⁹

Acquisition of Land Act 1981

s 4 (disregard of enhancements)⁴⁰

REVIEW

(2) The remaining provisions of the Land Compensation Act 1961 will be subject to review; they are:

ss 1-4 (Determination of disputed compensation)⁴¹

s 11 (land of statutory undertakers)

s 12 (outstanding right to compensation for refusal of permission)⁴²

³² See Proposal 17(2)(a)(ii).

³³ See Proposal 17(2)(a)(iii).

³⁴ See Proposal 5(3).

³⁵ See, respectively, Proposals 6(3) and 4(3).

³⁶ See Proposal 7(1).

³⁷ See Proposal 7(2).

³⁸ This complicated provision is linked to 1961 Act s 6, which is to be repealed without replacement.

³⁹ See Proposal 13.

⁴⁰ See Proposal 7(4)(b).

⁴¹ The President of the Lands Tribunal has proposed that ss 2-4 should be repealed and replaced (so far as necessary) by rules and practice directions: see Law Commission's Scoping Paper (March 2001), paras 46-7.

⁴² This section, which is related to obsolete provisions for compensation under the Town and Country Planning Act 1947, can probably be repealed.

s 31 (withdrawal of notices to treat)⁴³

s 32 (rate of interest after entry)⁴⁴

ss 33-42 (miscellaneous and interpretation)⁴⁵

[See Part X]

⁴³ To be considered as part of the Law Commission's Implementation Report (Autumn 2002).

⁴⁴ See Proposal 15, and note thereto.

⁴⁵ To be considered at the stage of detailed drafting.

PART III

NOTES ON PROPOSALS

GENERAL DEFINITIONS

Compulsory purchase

- 3.1 As appropriate for a standard code, the definition is intended, in principle, to be comprehensive, covering acquisitions of land under all forms of statute, public or private¹ (This follows section 1 of the Land Compensation Act 1961). It is not part of the present project to consider detailed modifications and exceptions which may be necessary under particular statutes.

Subject land and retained land

- 3.2 The terms “subject land” and the “retained land” are not intended as precise definitions,² but are intended to indicate the distinction in the existing law between the land subject to acquisition, and other interests held with it which may give rise to claims for severance or injurious affection. Under this proposal, the retained land must be “held with” the subject land, in the sense that joint possession gives enhanced value, but not necessarily that it should be “contiguous” with it.³ We have used the wider definition, but invite views.

Key dates

- 3.3 We identify three key dates for the purposes of compensation: (i) The “first notice date” is identified by the Policy Statement⁴ as the trigger date for compensation for disturbance, whether or not the compulsory purchase proceeds. (ii) The date of notice to treat, or deemed notice to treat, is the date when under the existing law the interests qualifying for compensation are “fixed”, in the sense that an interest must have been in existence at that date, to qualify for compensation under the Code. (iii) The “valuation date” is that confirmed by the Policy Statement in accordance with current case law;⁵ the general principle will be that, except as otherwise provided, the interests will be valued by reference to values at that date, and to the state of the land and surrounding circumstances as they exist at that date (see further Proposal 8).

¹ This accords with Land Compensation Act 1961, s 1.

² Cf the definition of “relevant land” and “relevant interest” in 1961 Act, s 39(2).

³ Cf, for example, Highways Act 1980 261, which requires regard to be had to any benefit to “the remaining continuous lands” of the claimant.

⁴ *Compulsory Purchase and Compensation: delivering a fundamental change* (DTLR, December 2001). Referred to in the Consultative Report as the “Policy Statement”. It sets out “the Government’s proposals for change” (pp7-33); followed by an Appendix: “Background to proposals and response to CPPRAG” (pp 39ff).

⁵ The definition would also need to provide for procedures not involving notice to treat, notably vesting declarations.

PROPOSAL 1: RIGHT TO COMPENSATION

- 3.4 This confirms the basic right to compensation for any interest in the subject land which was in existence at the date of notice to treat. Certain exceptions should be noted:
- (1) *Abortive orders* The Policy Statement proposed that there should be a right to compensation where an order is abandoned after the first notice date, and before notice to treat. This will be dealt with in the Implementation Report.
 - (2) *Minor interests* There are special provisions in the existing law for short tenancies or tenancies from year to year, which may expire before the order is implemented, or for which the authority may make special relocation arrangements. These will be addressed in the Implementation Report.
 - (3) *Interference with easements and other rights* Compensation can only be claimed under the existing law as and when the right is interfered with by the works. This is dealt with under Proposal 11 below.

PROPOSAL 2: HEADS OF COMPENSATION

- 3.5 We propose that the Code should include a statement of the overriding principle of “fair compensation” (which is a term used in the leading *Shun Fung* case⁶). The intention is not that that the Tribunal should have a discretion to depart from the detailed rules to achieve “fairness”, but simply that in cases of doubt it should interpret those rules in accordance with the principle. The Proposal also gives effect to the established principle of existing law that compensation is a “single global figure”, but is arrived at by reference to individual heads of claim. In line with the Policy Statement, we have retained the traditional names for the different heads of compensation.

PROPOSAL 3: MARKET VALUE

- 3.6 Market value is retained as the basic measure of compensation for the subject land, as under the 1961 Act, s 5(2). The proposed definition reflects established case law, by including a specific reference to the “willing buyer” as well as the “willing seller”. The second part of this Proposal is designed to address a possible ambiguity in the present law, as to whether the “market value” test applies only to the valuation of the subject land, or (as we understand the law) also to other matters depending on the value of land (such as severance and injurious affection).

PROPOSAL 4: DISTURBANCE

- 3.7 We have used the term “disturbance” (as in the case law) to cover not only the losses and expenses arising directly from displacement, but also any other monetary losses resulting from the compulsory acquisition (such as legal and professional fees, increased tax liabilities⁷ etc.). The definition is based on the

⁶ *Director of Buildings and Lands v Shun Fung Ironworks* [1995] 2 AC 111, 125 PC.

⁷ See e.g. *Alfred Golightly & Sons v Durham CC* (1981) 260 EG 1045.

existing case law. However, we have also dealt specifically with other issues as follows:

- (a) The reference to “personal circumstances” is intended to reverse the effect of the decision in *Bailey v Derby Corporation* [1965] 1 WLR 213, where it was held that the inability of the claimant to relocate due to old age was not something which could be allowed to increase the compensation. This decision has been strongly criticised. Its effect was partly reversed by the 1973 Act, s 46 which makes special provision for disturbance where a business is carried on by a person over 60 years of age. However, the rule could cause hardship in other cases, for example where the inability to relocate is due to ill health. The Australian Law Reform Commission recommended that there should be specific provision for personal circumstances and this is incorporated in the Australian legislation. Our provisional Proposal follows that model. We will however consult on this issue. We propose in any event to retain the effect of section 46 (Proposal 4(3)).
- (b) In accordance with the Policy Statement we have provided specifically for legal and professional costs reasonably incurred to be included in the claim.
- (c) The Policy Statement recommended that the criteria for choosing between relocation and extinguishment should be spelt out. It seems to us that the present law is reasonably well understood (following the *Shun Fung* case), without the need for detailed codification. However, it is desirable to make clear that there is a presumption in favour of relocation, so that compensation may be allowed on that basis even where it exceeds the compensation payable on the extinguishment basis. However, the Tribunal will be able to determine that relocation is “unreasonable in all the circumstances”. This formula is intended to be more flexible than the “reasonable businessman” test, as adopted in the *Shun Fung* case, in order to cater for circumstances where relocation may be a reasonable option (for example, for a family business) even though it would not meet strict business criteria. The cost to the authority and the value of the business to the claimant are treated as factors to be taken into account in the overall judgment of reasonableness.
- (d) This follows a Proposal of the Policy Statement, designed to reverse the effect of a Lands Tribunal decision.⁸ The Tribunal had rejected a claim for the cost of replacing agricultural buildings on retained land, made necessary by severance of the subject land, because compensation for severance was limited to diminution in market value. We have provisionally proposed that the Tribunal should have a discretion to allow such claims, in respect of both agricultural and other business holdings, where the need for the

⁸ *Cook v Secretary of State* (1973) 27 P&CR 234, LT.

replacement is attributable to the acquisition and the cost is not adequately reflected in any other head.

- (e) Under the existing law (since the *Shun Fung* case) it is clear that losses due to the *threat* of compulsory acquisition may be claimed, but possible uncertainty arises from the lack of any clear start date. We have followed the Policy Statement by adopting the “first notice date” as the trigger for such claims.
- (f) This reproduces a provision (introduced by the 1973 Act), intended to provide limited “disturbance” rights for owners of investment properties.

PROPOSAL 5: INJURY TO RETAINED LAND

3.8 This is intended to reproduce the effect of the present law (under 1965 Act, s 7) relating to “severance” and “injurious affection”, where the subject land was held by the claimant with other land (“the retained land”). We have imported the definition of “relevant project”, from Proposal 9, to make clear that it is the effects of the project as a whole that is to be taken into account.⁹ The following points may be noted:

- (1) As under the present law (as we understand it), the measure of compensation is the diminution in the market value of the retained land (which may include a diminution in letting value, where the injury is temporary – see s 5(5)). There is a possible policy issue whether the claim should include other losses, such as loss of profits (for example, in relation to a hotel business which suffers a fall in turnover while road construction works are being carried out on adjoining land).¹⁰ A similar issue arises in relation to injurious affection where no land is taken (see Proposal 17 below). We propose to consult on this question.
- (2) We have included provision to offset any enhancement in the value of the retained land due to the works (“betterment”). Under the existing law the overall compensation may be reduced to the extent that any adjoining land of the claimant has enjoyed betterment.¹¹ This can be seen as unfairly discriminating against the owner some of whose land is compulsorily acquired, as compared to other owners in the vicinity who enjoy the betterment without any deduction. Accordingly, the Policy Statement, in line with a CPPRAG recommendation, proposed that such betterment should be offset only against any claim for severance or injurious affection in respect of the retained land.

⁹ This principle is implicit in 1973 Act, s 44, which refers to the “whole of the works”; for the avoidance of doubt we also have reproduced that phrase in 5(3).

¹⁰ Other common law jurisdictions have taken different views on this issue. For example, the ALRC recommended retention of the market value basis, in the interest of certainty and ease of assessment. The Ontario Expropriations Act R.S.O. 1990, c. E-26 (“Ontario Act 1990”), on the other hand, provides for loss of profit to be included.

¹¹ 1961 Act, s 7. *Wilson v Liverpool City Council* [1971] 1 WLR 302 (see Appendix) provides an illustration.

- (3) We have included (in (4)) provision for what is sometimes called a “before and after” valuation, again in line with recommendations of CPPRAG. Under the existing law, at least in theory, the subject land and the retained land should be valued separately for compensation purposes. It may be more convenient, and in some cases fairer to the claimant, for there to be a comparison of the total holding before the acquisition with the retained holding thereafter. We have suggested that this should be available at the election of the claimant, who will thus have the benefit of whichever is the more favourable basis of compensation.
- (4) Temporary damage to market value loss will normally be reflected in lost rental value,¹² but we have proposed that the Tribunal should have a wider discretion to deal with special cases. We would particularly welcome views of valuers on this point.

PROPOSAL 6: EQUIVALENT REINSTATEMENT

- 3.9 This reflects the existing law relating to equivalent reinstatement, for special uses for which there is no general market (typically churches). The wording of the present provision (1961 Act, s 5(5)) leaves possible doubt as to whether this is a matter of right (if the conditions are satisfied), or is dependent on a general discretion of the Tribunal. The proposal treats it as a matter of right, unless the authority is able to persuade the Tribunal that it is unreasonable having regard to the likely cost to the authority and the likely benefits to the claimant.

PROPOSAL 7: INCIDENTAL RULES

- 3.10 We deal here with a number of incidental rules, generally in accordance with existing law:

- (1) Where an interest in the subject land is limited in time (such as a lease), the prospects of continuation or renewal (in the absence of the project) should be taken into account, in assessing compensation both for that interest and for any superior interests. This reflects, in simpler form, the spirit of provisions of the 1973 Act, which make express provision for business tenancies and agricultural tenancies.¹³
- (2) This reflects an existing provision to ensure that the statutory duty of the authority to re-house residential tenants is treated as neutral for compensation purposes.

¹² Cf *Wildtree Hotels v Harrow LBC* [2001] 2 AC 1, 16 G-H, *per* Lord Hoffmann: “Obviously if one is considering damage of which the effects will continue for some time into the future, such as the permanent deprivation of light or a right of way, it is sensible to take a valuation date and capitalise the value of the future loss at that date. But in respect of damage which has occurred in the past, there seems to me no reason why one should not calculate the effect which it has had upon the value of the land in the sense of reducing its letting value in the open market while the damage continued.” (The case was concerned with injurious affection where no land is acquired; see proposal 17).

¹³ 1973 Act, ss 47 and 48. The latter reversed the effect of the decision in *Rugby Joint Water Board v Footitt* [1973] AC 202.

- (3) This is a simplified version of the 1961 Act, s 5(4), which excludes uses for a purpose contrary to law. The Policy Statement, contrary to the recommendation of CPPRAG, proposed that this should be retained. There is a possible policy issue whether there should be any exceptions to this rule, for example for technical or unintentional breaches, which can be easily remedied. We shall consult on this issue.
- (4) We have brought together the common law rule that the burden on the authority cannot be increased by new interests created after the notice to treat, and the statutory rule (Acquisition of Land Act 1981, s 4) which requires there to be excluded any new interests or works which (in the opinion of the Tribunal) were not necessary and were designed to improve compensation.
- (5) This rule gives effect to the “consistency” principle, established by existing case law.¹⁴ Thus, for example, if the subject land is valued on a basis which assumes redevelopment and consequent displacement of the existing business, losses caused by dispossession of the business cannot be included in a claim for disturbance.
- (6) The claimant’s “duty to mitigate” is well established by existing case law, and we are not proposing any alteration in substance. It is most relevant to compensation for disturbance, but could in principle apply to other heads of claim (for, example, temporary injurious affection to retained land – see Proposal 5). We have followed the Policy Statement in fixing the “first notice date” as the trigger for the claimant’s duty to mitigate.

PROPOSAL 8: DATE OF ASSESSMENT

- 3.11 This provision is intended to clarify the dates by reference to which compensation is to be assessed. Case law has clearly established that the *valuation* date is the date of possession (or earlier determination of compensation). However, there remains some doubt as to how this rule applies to changes in the nature of the interest after notice to treat: for example, if a lease is in existence at the date of notice to treat but is terminated for some reason before the valuation date; or if a building in existence at the notice to treat is destroyed before the valuation date. The general effect of the cases appears to be that, provided the interest was in existence at the date of notice to treat, it is to be valued as it stands at the valuation date. Under our proposals, this general rule will be subject to the rules relating to new interests and enhancements (Proposal 7(4)) and the rules for disregarding changes in value due to the project of acquisition and for planning assumptions (Proposals 9 and 10). Proposal 8 is designed to give effect to this principle.
- 3.12 The other main policy issue relates to the date for assessing compensation on the equivalent reinstatement under Proposal 6. Present case law establishes that this is the date when reinstatement becomes reasonably practicable.¹⁵ The Policy Statement has proposed adopting the date when the authority acquire ownership

¹⁴ See *Horn v Sunderland Corp* [1941] 2 KB 26.

¹⁵ Following the *West Midland Baptist* case [1970] AC 874, 897C, 899C *per* Lord Reid.

or take possession.¹⁶ However, we consider that the established test is likely to be fairer and more accurate, and we have therefore included it in this Proposal. We invite views on this issue.

PROPOSAL 9: DISREGARDING THE PROJECT

Introduction

- 3.13 This group of Proposals deals with the most difficult issue we have had to address, that is, the rule that values must be assessed disregarding the “scheme” of acquisition (the so-called *Pointe Gourde* principle, or “no-scheme rule”). Although the general concept is not controversial, the existing case law and statutory provisions are notoriously confused and difficult to apply. We propose to “clear the decks” and start again.¹⁷ All the existing statutory and judicial versions of the rules will be repealed, and replaced by a new set of provisions, designed to introduce greater precision, certainty and coherence.

Uncertainty of the “scheme” or “project”

- 3.14 A particular problem is uncertainty over the scope of the “scheme”. Historically, one cause has been the changes in the way compulsory purchase is authorised. The existing law is derived from a time when most compulsory acquisitions were authorised by special Acts for particular projects (such as railways, or reservoirs). Under such statutes the extent of the scheme or project was clearly defined by the statute. By contrast, most modern acquisitions are made under general statutory powers, and there may be no need for specific statutory authorisation of the project as such. Compulsory powers may only be needed for a small part of the whole project.¹⁸
- 3.15 In the case law, supplemented (or complicated) by statute, the word “scheme” has been used variously to describe: the simple fact of compulsory purchase; the particular project of which the compulsory purchase is an “integral part”; or the whole of the “underlying scheme”, which may including the planning background over a wide area and going back many years.¹⁹ The wider the “scheme” is drawn, the more speculative the exercise of reconstructing a “no-scheme world” for valuation purposes; and, where the effect of the scheme is beneficial, the greater the potential for unfairness between dispossessed owners, and owners of other comparable land in the area, who will enjoy the full benefit.
- 3.16 We propose to discard the word “scheme”, as it is too imprecise and it carries too much historical baggage. We take as our starting-point a more precise definition of

¹⁶ Policy Statement, para 4.9.

¹⁷ See *Compulsory Purchase and Compensation: Disregarding “the scheme” – A Discussion paper* (Law Commission, October 2001), Part E, para 5.1, page 42 and Consultative Report, LCCP 165, Part VI.

¹⁸ See e.g. *Wilson v Liverpool Corp* [1971] 1 WLR 302 (summarised in the Appendix), where the “project” for housing development related to 391 acres, of which only 73 acres were acquired compulsorily, the remainder having been acquired by agreement.

¹⁹ The historical development of the rule is discussed in detail in the Consultation Report, LCCP 165, and is further reviewed in the Court of Appeal decision in *Waters v Welsh Development Agency* (June 2002).

the “relevant project”, which is supported by existing authority.²⁰ The definition is intended to provide an analogy with the kind of project, which might in the past have been the subject of a special Act. It is intended to direct attention to the particular project,²¹ for which the acquisition of the subject land is authorised, and of which the works or uses on the subject land will be an integral part. Such a definition would be a marked improvement over the present mixture of statutory and judicial versions.

3.17 As a possible alternative, to provide greater certainty, we suggest that there could be a presumption (against the authority, but not the owner) that the project is confined to the area of the particular compulsory purchase order,²² but it would be open to the authority to define in the order documents a wider project starting from an earlier date. This alternative is in italics, as proposal 9(2A), in Part II above.

3.18 We invite comments on this alternative.

Cancellation assumption

3.19 To provide further clarity, we have included Proposal 9(2)(c) to apply a “cancellation assumption”. This is based on the “cancellation approach”, which the House of Lords confirmed as the correct approach when determining appropriate alternative development (under 1961 Act, s 17).²³ Although the House was not there directly concerned with the “no-scheme rule”, it emphasised the difficulty of trying to “reconstruct the planning history of an area on the assumption that the proposal had never come into existence at all.”²⁴ The “cancellation approach” confined rewriting of history to the assumption that the proposal was cancelled on the date of the proposal to acquire (equivalent to the “first notice date” as defined above). Implicit in that approach (and stated expressly in our proposal) is the assumption that there would have been no other project under statutory powers to meet the same need²⁵ (The possibility of a similar *private* project is not excluded).

Objectives

3.20 We distinguish between three main objectives for the new rules:

²⁰ See e.g. *Birmingham DC v Morris & Jacombs Ltd* (1973) 33 P & CR 27.

²¹ There is sometimes an issue whether two linked projects are to be treated as one, for the purposes of the rule (see e.g. *Fraser v Fraserville City* [1917] AC 187). This, as now, will be an issue of fact for the Tribunal.

²² This is consistent with 1961 Act, s 6, under which the development to be disregarded was limited to the area of the compulsory purchase order, unless the land was part of a specific statutory designation (such as a comprehensive development area, or a designated new town).

²³ *Fletcher Estates Ltd v Secretary of State* [2000] 2 AC 307.

²⁴ *Ibid*, p 323.

²⁵ See *Grampian Council v Secretary of State* [1983] 1 WLR 1340, 1345. See also 1961 Act, s 15(5)-(8) which makes specific provision that, where land is acquired for a highway, it is to be assumed that no other highway would be constructed to meet “the same or substantially the same need”.

- (1) Protection of the acquiring authority from having to pay a price inflated by its own regeneration activities or its own special location requirements;
 - (2) Protection of the landowner from “blight” connected with the project;
 - (3) Clarifying the planning status of the relevant land for valuation purposes.
- 3.21 The authority will be protected by a provision requiring a disregard of any *increase* in value caused by the relevant project, assessed on the cancellation assumption. This is intended to reflect the narrower versions of the existing judicial rule.
- 3.22 The landowner will be protected by a wider rule requiring disregard of any *decreases* in value or reduced profits caused by the project itself or any advance “indication” of the project. The word “indication” is taken from the 1961 Act, s 9, which refers only an indication of the specific threat to acquire the subject land. By referring to “the project”, we cover cases where the blight is due to the effects over a wider area (for example, a corner shop in an area of redevelopment, whose profits are reduced as the surrounding area is cleared of inhabitants). As an innovation, we propose that this rule (which is in principle concerned with “blight”) should also be linked to the existing provisions for “statutory blight” under the Town and Country Planning Act 1990 (or any replacement of those provisions): see Proposal 9(5).²⁶
- 3.23 Planning status is dealt with separately under Proposal 10.

PROPOSAL 10: PLANNING STATUS

General approach

- 3.24 The 1961 Act contains elaborate provisions to define the permissions, actual or assumed, which are to be taken into account in the valuation (for which we use the term “planning status”). The rules appear to exhibit some ambivalence, as to whether the planning status of the land is to be taken as it is in the real world, or is to be reconstructed in a hypothetical “no-scheme world”. Thus, on the one hand, regard is to be had to any *actual* permissions for development of any site which includes the subject land (whether or not those permissions would have been granted apart from the scheme); and permission is to be assumed for the authority’s own development. On the other hand, 1961 Act, s 17 introduces a hypothetical element, by providing a procedure which enables permission to be assumed for developments which would have been permitted in the absence of the proposal for compulsory purchase.
- 3.25 We think that, in this respect, the approach of the 1961 Act can be defended. It is right in principle to treat the actual planning status of the land as a fixed factor, not subject to the “no-scheme” test. This is consistent with the modern planning system, under which planning permission runs with the land, and, in general, there is no provision for recoupment of planning gains or compensation for planning

²⁶ Town and Country Planning Act 1990, s 149, Sched 13. Owners of land “blighted” by inclusion within areas allocated for certain categories of public development are, subject to detailed rules, enabled to require the purchase of their land by means of a “blight notice”. The Policy Statement proposes a new regime for statutory blight to be introduced by statutory instrument.

losses. Furthermore, this approach limits the possible area of speculation.²⁷ On the other hand, at the more detailed level, the section 17 certificate procedure recognises the perceived unfairness of depriving an owner of the value of a potential development site, because it has been selected to meet a public need, such as for a school, as compared to his neighbours who have the advantage of permission for private development.

3.26 Accordingly, our proposals retain the general approach of the existing law. However, it is made clear that these rules are solely concerned with “planning status”, that is the planning permissions, actual or assumed, to be taken into account in valuation. No assumption is made, under this Proposal, as to the likelihood of implementation. Thus, even though permission is assumed for the authority’s own proposed development, no assumption is made as to the prospect of implementation by the authority (for example, by investment in roads and infrastructure). That prospect must be tested under the “project disregard” rule (Proposal 9).²⁸

Planning status rules

3.27 The main points are as follows:

- (1) The claimant will be able to claim the benefit of any actual permissions in existence at the valuation date, in addition to an assumed permission for the authority’s development.
- (2) Further, he or she may claim the benefit of an assumed permission for any alternative development which would have been permitted if the land had not been proposed for compulsory acquisition. This will be assessed in accordance with the “cancellation assumption” as explained above.
- (3) These assumptions will not be limited, as now, to the subject land. This can cause arbitrary and unrealistic distinctions between the assumed planning status of that and any surrounding land which is relevant to the valuation.
- (4) The claimant or the authority will have the option of seeking an advance determination of this issue by a procedure similar to the section 17 certificate procedure: Proposal 10(3). Under this, a decision (in the form of a planning status certificate) is made by the local planning authority, which is then taken into account by the Tribunal. However, in recognition of the hypothetical nature of the exercise, the rules are more flexible than under the 1961 Act; thus:

²⁷ For example, in the *Wilson* case (see the Appendix), permission was assumed for residential development on the subject land, because of the actual permission and the authority’s own proposal. Without that assumption, the Tribunal would have had to embark on a wholly speculative inquiry, to find out what would have happened to the planning of the area, if the authority had not selected it for its own residential scheme.

²⁸ Thus, in the *Wilson* case (see Appendix), permission was assumed for residential development in accordance with the authority’s project; but the added value given to the subject land by the prospect of implementation by the authority (including infrastructure improvements etc.) had to be disregarded.

- (a) The application need not be confined to the precise area of the subject land (which will have been selected by the authority for the purposes of its project, and may not represent a sensible site for alternative development);
 - (b) The certificate will give only “general indications” of the conditions or obligations likely to be imposed. In the real world these would be subject to detailed negotiations between developer and planning. It is unrealistic and wasteful of resources to require such detail in a hypothetical exercise. It will be for the Tribunal, where relevant, to hear evidence and reach a view as to the likely effect of such requirements on value.
- (5) At present the appeal against such a decision lies to the Secretary of State. We have included this as a possible option: Proposal 10(3)(d)(A). However, we have also included an alternative option of appeal to the Lands Tribunal: Proposal 10(3)(d)(B). This seems to us likely to be a more efficient use of resources, since the Tribunal may have to determine the issue in any event, as part of the ordinary process of assessing compensation. Furthermore, there may be doubts as to whether a procedure for appeal to the Secretary of State is consistent with the Human Rights Act 1998, at least where a Government Department is the acquiring authority.²⁹ The regulations could provide (with the agreement of the Chief Planning Inspector) for the actual decision to be made by an inspector under procedure analogous to the present local inquiry (with delegated authority from the Tribunal, instead of the Secretary of State).
- (6) The intention is that the rules for establishing planning status, actual or assumed, should be an exclusive code. This represents a departure from the present law where it is possible for different decisions to be reached under the statutory rules and under the judicial version of the no-scheme rule.

PROPOSAL 11: INTERFERENCE WITH EASEMENTS ETC

3.28 Compensation where easements or other rights are interfered with is covered (under the existing law) by the rules for injurious affection where no land is acquired (see Proposal 17). This seems anomalous. Although no actual interest is “acquired” in these cases, the effect on the owner is very similar, since legal rights are diminished or nullified by compulsion. We propose that there be a specific right to compensation in the Code to deal with these cases. Compensation is based, as under the existing law, on the diminution if any in the value of the holding to which the right is attached.

²⁹ See e.g. the *Fletcher Estates* case, where the “Secretary of State” was effectively deciding his own appeal, on the amount of compensation payable for a government road scheme. *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 does not necessarily deal with this matter, since, unlike any of the cases considered in that case, the section 17 process involves no policy issue relevant to the real world, and is purely a step in assessing compensation. See, however, the flexible approach adopted by the Court of Appeal decision in *Begum v Tower Hamlets LBC* [2002] 2 All ER 668.

- 3.29 There is a possible policy issue, on which we shall consult, whether there should be a more generous basis of compensation, taking account of what the owner of the right would have been able to negotiate with the authority for release of the covenant in negotiations between willing parties.³⁰

PROPOSAL 12: ACQUISITION OF RIGHTS

- 3.30 The Code needs to deal specifically with cases where the enabling statute permits the acquisition of a right over land rather than the whole of an existing interest. The typical example under the present law is the Local Government (Miscellaneous Provisions) Act 1976 which provides such a power in relation to acquisitions by local authorities. Under the existing law compensation is based on the diminution in the market value of the land over which the right is acquired. This is reproduced in our Proposal.
- 3.31 Again, there is a possible issue as to whether the compensation should reflect the value which would have been arrived in negotiations between willing parties. We shall consult on this point.

PROPOSAL 13: ADVANCE PAYMENTS

- 3.32 The Code will reproduce, in substance, the provision of the 1973 Act which require authorities to pay, by way of advance payments, up to 90% of the estimated compensation claim (subject to an amendment proposed by the Policy Statement in relation to mortgaged property).
- 3.33 We were asked to consider ways in which this could be enforced. The Policy Statement rejected the possibility of an interim procedure before the Lands Tribunal, which might have the effect of requiring them to decide the same issues twice. The only realistic alternative is a procedure in the County Court. We think the primary duty to make a proper estimate must remain with the authority. However, if it delays unreasonably in doing so, or if its estimate is obviously inadequate, the claimant should be able to bring a complaint to the County Court. The County Court would not itself make an estimate, but it could order the authority to make a revised estimate and set time limits for doing so; and if appropriate could adjourn the proceedings for a specified period while such a revised estimate was made.
- 3.34 We think such a procedure offers an effective and practical solution to the problems of enforcement, without in any way pre-empting the ultimate decision of the Lands Tribunal. However, this will be subject to consultation.

PROPOSAL 14: LANDS TRIBUNAL JURISDICTION

- 3.35 Possible problems can arise where there are doubts as to whether the matter falls within the Lands Tribunal jurisdiction or should be subject to a common law claim. We propose that the Lands Tribunal should have an extended jurisdiction

³⁰ Cf Telecommunications Act 1984, Sched 2, para 7(a), which refers to the amount which appears "fair and reasonable if the agreement had been given willingly"; illustrated by *Mercury Communications Ltd v London and India Dock Investments Ltd* (1995) 69 P&CR 135 (summarised in the Appendix).

in such cases to deal with common law claims arising out of the matters which are before it on a reference.

PROPOSAL 15: INTEREST

- 3.36 The present law provides for interest to be paid on the ultimate amount of compensation from the date the authority takes possession. The rate of interest is prescribed by statutory instrument. The rates so prescribed relate to compensation under a variety of different statutes, not all dealing with compulsory purchase of land, and consideration will need to be given whether to reproduce this effect in the new Code. There is a case, in any event, for increasing the prescribed rate to a more commercial rate, but this can be done under existing legislation. There have also been suggestions that compound interest should be payable. This is subject to a separate study by the Law Commission relating to courts and tribunals generally.

PROPOSAL 16: SUBSEQUENT PLANNING PERMISSIONS

- 3.37 Section 23 of the 1961 Act contains a complex procedure for additional compensation to be claimed where a new planning permission is granted within ten years of the original acquisition. This was included in the 1961 Act, repealed in 1967 but reinstated in 1991. If it is to be retained, it needs to be updated and simplified. However, it seems anomalous in principle, since the compensation paid under the Code should reflect the full value at the time of the acquisition, including any “hope” value relating to the possibility of future permissions. The provision for subsequent compensation seems to us an unnecessary complication and we propose its repeal.

PROPOSAL 17: COMPENSATION FOR EFFECTS OF PUBLIC WORKS

- 3.38 Limited compensation rights are given by the present law to those in the vicinity of public works from whom no land is acquired. The 1965 Act, s 10 allows a claim for injurious affection caused by the *construction* of the works, in circumstances where there would have been a common law claim in the absence of statutory immunity. The 1973 Act provides a more detailed code for damage caused by the *use* of the public works (for example, noise from the traffic using a road). The 1965 Act provision (dating from the 1845 Act) is obscurely drafted, but has been recently clarified by a decision of the House of Lords. The 1973 Act represents a modern code, which, according to CPPRAG, has worked well in practice. In combination, the rules appear to be as generous as any provided by comparable systems of law in other countries.
- 3.39 Strictly speaking these rules are not part of the law of compulsory purchase, since they depend, not on the compulsory acquisition of land, but on the carrying out of public works (which may be on land already owned by the authority, or acquired by agreement). We propose, in line with recommendations of CPPRAG, that they be “merged”, by amendment of the 1973 Act to include a modernised version of section 10. This will then represent a separate code from that relating to compensation for compulsory purchase. Again in line with CPPRAG, we propose that the rights under the 1973 Act should be extended to all businesses, rather than as now being limited by reference to rateable value (£24,600); that the present limitation to existing use value should be removed; and that there be other detailed improvements.

- 3.40 A possible issue, on which we propose to consult, is whether claims should be limited, as now, to diminution in market value, or should include other losses such as losses of profits.

PROPOSAL 18: REPEALS

- 3.41 The intention is to provide a “core” compensation Code, replacing the standard provisions for compensation in the 1961, 1965, 1973 and 1981 Acts. The proposed repeals are set out in this Proposal.
- 3.42 We note in addition the proposal of the President of the Lands Tribunal that 1961 Act sections 2-4 (relating to procedure and costs in the Tribunal) should be repealed, and replaced so far as necessary by procedural rules. This is outside our immediate terms of reference, but deserves consideration for early legislative action.

OTHER MATTERS NOT COVERED BY THE CODE

- 3.43 We have not at this stage addressed the provisions dealing with special categories of land (such as minerals, land of statutory undertakers, commons etc.). It may be that provision could be made for the provisions on such matters to be updated in due course by statutory instrument.
- 3.44 Certain other related matters are not included:
- (1) *Additional loss payments* The Policy Statement has proposed that there should be a new system of loss payments to replace the present provisions for home and business loss payments. We understand these are being developed separately by the Department and may form the subject of early legislation. They can be incorporated in due course into the Code.
 - (2) *Disturbance payments* Section 37 of the 1973 Act confers rights to “disturbance payments” in certain circumstances, on lawful occupiers displaced as a result of compulsory acquisition or other public works, where they have no other right to compensation. These provisions are not confined to compulsory purchase, and we think it better to leave them as part of the separate provisions of the 1973 Act.
 - (3) *Minor tenancies* As already noted there are special rules for minor tenancies, although the rules differ slightly as between the notice to treat procedure and the vesting declaration procedure. These are more closely related to the question of implementation, which will be the subject of our Implementation Report. We propose to deal with them at that stage.

PART IV

CONSULTATION QUESTIONS

GENERALLY

Consultees are invited to comment on any aspect of the provisional proposals, both from the legal point of view, and from the point of view of practicality and cost. Without prejudice to that general invitation, we have identified the following as matters likely to give rise to differing views, and as ones on which we would welcome specific answers. The items shown in square brackets below are discussed in the main Consultative Report, LCCP 165.

PROPOSAL 2: HEADS OF COMPENSATION

Do consultees agree that:

- (1) The Code should include a statement of the objective of “fair compensation”?***
- (2) This should be expressed as principle of interpretation only (rather than as permitting the Tribunal any general discretion to depart from the detailed rules)?***
- (3) The right to compensation should be a right to a single (“global”) amount, assessed having regard to the detailed rules (market value, disturbance etc)?***

PROPOSAL 3: MARKET VALUE

Do consultees agree that:

- (1) “Market value” should be defined as the amount for which the land might be sold by a willing buyer to a willing seller;***
- (2) The market value test should apply (except as otherwise stated) to any provisions of the Code depending on the value of land?***

PROPOSAL 4: DISTURBANCE

(1) Do consultees agree that:

- (a) The term “disturbance” is a suitable shorthand for all heads of compensation currently assessed under rule (6) (of 1961 Act, s 5)? If not, what term should be used?***
 - (b) Compensation under this head should (as now) exclude any loss “directly based on the value of land”?***
- (2) The matters to be taken into account should include “circumstances personal to the claimant”?***

- (3) ***In determining, on the displacement of a business, whether compensation should be on the “relocation” or “extinguishment” basis:***
- (a) ***Should the test be a simple test of “reasonableness”, rather than the “reasonable businessman” test (as explained in the Shun Fung case)?***
 - (b) ***Is it unnecessary for the Code to prescribe the circumstances in which compensation on either basis will be regarded as reasonable?***
- (4) ***Should there be:***
- (a) ***Specific provision for compensation to include costs reasonably incurred in replacing buildings, plant or other installations needed for a business, if fairly attributable to the acquisition, and not adequately reflected in other heads?***
 - (b) ***If so, do consultees agree that:***
 - (i) ***The right should apply to all types of business (not simply agricultural);***
 - (ii) ***The right should apply whether the buildings are on the land subject acquisition or on retained land?***

PROPOSAL 5: INJURY TO RETAINED LAND

- (1) ***Under the existing law:***
- (a) ***Is compensation for injurious affection assessed solely by reference to diminution in market value? If not, what other factors are taken into account?***
 - (b) ***How, if at all, is temporary loss taken into account?***
 - (c) ***By reference to what valuation date is compensation assessed?***
 - (d) ***Do the present rules give rise to any other problems needing to be addressed in the new Code?***
- (2) ***How should the issues (a) to (d) be dealt with in the new Code?***
- (3) ***In particular, what problems or additional costs would be caused for authorities, if compensation under these heads were to include compensation for loss of profits?***
- (4) ***Should express provision be made (as we propose) for assessment under these heads to be based on a “before and after” valuation of the holding? If so, should it be mandatory, or (as we propose) at the option of the claimant?***

- (5) ***Should the “retained land” be limited to land “contiguous” to the subject land?***

PROPOSAL 6: EQUIVALENT REINSTATEMENT

Do consultees agree that:

- (1) ***The existing rule (5) for equivalent reinstatement should be reproduced in the new Code in substantially its existing form? If not, what changes, or further definitions are required?***
- (2) ***The nature and extent of the discretion to refuse compensation on this basis should be set out in the Code (as proposed in proposal 6(2))?***
- (3) ***No specific provision should be made for a deduction for any increased value of the new premises?***

PROPOSAL 7: INCIDENTAL RULES

- (1) ***In relation to proposal 7(3), should there be any exception to the principle that unlawful uses are disregarded (for example, where the breach is technical or unintentional, and easily remedied)?***
- (2) ***If so, how should the exception be defined?***

Do consultees have any other comments on the incidental rules as proposed above?

PROPOSAL 8: DATE OF ASSESSMENT

Do consultees agree:

- (1) ***In relation to interests in existence at the date of notice to treat, the valuation date should be taken as the date for fixing the nature and extent of the interests?***
- (2) ***The date for equivalent reinstatement should be defined as the date at which reinstatement could reasonably begin (in accordance with the present West Midlands Baptist approach)? Or, alternatively, should it be based on making an assessment at whichever is the earlier of (i) the date on which the acquiring authority acquire ownership of the property, in law or equity, or (ii) the date on which the authority takes possession of it?***
- (3) ***There is no need for any specific provision for fixing the date of other heads of compensation, or adjusting them to a common date?***
- (4) ***Notwithstanding (3), interest should (as now) run on the total amount of the compensation from a single date (the date of possession)?***

PROPOSAL 9: DISREGARDING THE PROJECT

[(A) Do consultees agree with our provisional view as to the preferred version of the existing rule: that is, that there are to be disregarded changes in value attributable to the prospect of, or the carrying out of, the project for which the authority is authorised to acquire the land?

(B) Do consultees agree (a) that a statement of the no-scheme rule (however named) should in principle be reproduced in the new Code; and (b) that it should be in the form of a new provision, or set of provisions, in substitution for all existing versions.

(C) Should the no-scheme rule, in its application to increases in value, be modified so as to enable regard to be had to the amount which the acquiring body itself would have paid in friendly negotiations (in accordance with the Indian case):

- (a) In all cases?*
- (b) In cases where the acquisition is for purposes of a “commercial” nature?*
- (c) In no cases?*

If the answer is (b), then:

- (i) How and by what criteria should such “commercial” cases be defined?*
- (ii) Do consultees favour a “public interest certificate” mechanism (as proposed in the Scottish Executive Review)?*

(D) Do consultees agree with our provisional proposal that:

- (1) In the new Code, the preferred rule (in a statutory form) should be used as the basis for defining the “scheme”?*
- (2) Alternatively, or in addition, should consideration be given to either of the following:*
 - (a) Where an authority is promoting the compulsory purchase order for the purposes of a project including land other than that comprised in the order, the authority should be required (for valuation purposes) so to certify in the order, identifying the nature and extent of the project?*
 - (b) If so, should the owner’s right of challenge be:*
 - (i) At the confirmation stage (by objection to the confirming authority) or*
 - (ii) Before the Lands Tribunal?*
- (3) Should provision be made, in the Government’s proposed new planning framework, to enable the definition of the “project” for compensation purposes to be linked (where appropriate) to development proposals, or development zones, identified in Action Area plans?*

(E) Should provision be made that:

(1) In defined circumstances, where land is required solely for access or otherwise for provision of services, to serve other new development, the compensation should exclude any element based on the value of the new development?

(2) If so, (a) how should those circumstances be defined, and (b) to what qualifications should they be subject (e.g. a defined uplift to existing use value)?]

(F) We invite views of consultees generally on the above provisional proposals, including in particular:

(i) Do they agree that all existing versions of the no-scheme rule should be replaced by a single statutory set of rules?

(ii) Do they agree with our proposed definition of the “relevant project” as the basis of the new rules?

(iii) Do they agree with our proposal to apply the “cancellation approach” in this context?

(iv) Would they favour the suggested alternative for defining the “project” at the time of the order (para 7.17 in the main Consultative Report, LCCP 165); if so, should the authority’s definition of the project be open to challenge (a) at the time of confirmation of the order, by objection to the confirming authority, or (b) only before the Tribunal, at the time of the determination of compensation?

PROPOSAL 10: PLANNING STATUS

We invite consultees’ views generally on the above proposals. In particular:

(1) Do consultees agree that (a) permissions existing at the valuation date should be taken into account (whether or not they would have been granted apart from the project) (b) permission should be assumed for development in accordance with the authority’s proposals?

(2) In relation to the proposed “planning status certificate”:

(a) Do consultees agree that the applicant should be permitted to include (as we propose) the subject land or any part of it, and any adjoining land which could reasonably have been expected to be part of the same development (whether or not in the ownership or control of the claimant); if not, how should the application area be defined?

(b) Do consultees consider (i) that the existing right of appeal to the Secretary of State should be retained or (ii) that the local planning authority’s decision should be subject to appeal to the Lands Tribunal, which may, at the discretion of the Tribunal, be dealt with in advance of, or at the same time as, other valuation issues; and, in the former case, may be delegated to a planning inspector?

PROPOSAL 11: INTERFERENCE WITH EASEMENTS ETC.

- (1) Do consultees agree that compensation for interference with easements or other rights should be separated from the rules for compensation for injurious affection where no land is taken?**
- (2) In any event, on what basis should compensation be assessed? In particular:**
 - (a) Should compensation be based (as now) solely on diminution in the market value of the land to which the right is attached; or**
 - (b) Should it reflect the “market value” of the right itself (that is, the amount which would have been paid for release of the right in negotiating between willing parties)?**

PROPOSAL 12: ACQUISITION OF RIGHTS

- (1) Should the compensation for acquisition of new rights be assessed:**
 - (a) As now by reference to the diminution in the value of land or,**
 - (b) By reference to the “market value” of the right (that is, the amount which would have been paid for grant of the right between willing parties)?**
- (2) Should compensation for severance be allowed? If so, in what circumstances could it arise (other than those covered by injurious affection)?**

PROPOSAL 13: ADVANCE PAYMENTS

Do consultees agree that the County Court should have jurisdiction (as proposed above) to review and enforce the performance of the authority’s duties in relation to advance payments? If not, what alternative mechanism would be appropriate?

PROPOSAL 14: LANDS TRIBUNAL JURISDICTION

Do consultees agree that the Lands Tribunal should have extended jurisdiction as proposed to deal with a common law claim arising out of the same facts as a compensation claim already before the Tribunal?

PROPOSAL 15: INTEREST

Are there any particulars in relation to the award of interest which require to be addressed in the new Code, for example relating to:

- (1) Professional fees (including VAT);**
- (2) Loans incurred to meet disturbance costs;**
- (3) Any other specific items of cost?**

[TAX

- (1) *Do consultees agree that (as proposed by the Policy Statement) additional tax liabilities arising out of the compulsory purchase can be satisfactorily met by the law of disturbance, supplemented by advice agreed with the Revenue.*
- (2) *If not, what provision should be made in the Code for such tax liabilities?*
- (3) *Are there any other tax issues arising out of the law of compensation which should be addressed in the new Code?*
- (4) *We would welcome specific examples of any problems experienced in practice.]*

PROPOSAL 16: SUBSEQUENT PLANNING PERMISSION

Views are invited on the following:

- (1) ***Do consultees agree that provisions for compensation for subsequent permissions (1961 Act, Part IV) should be repealed without replacement?***
- (2) ***If not, what changes should be made to the detailed rules; in particular:***
 - (a) ***Should the claim be limited to any new permissions which are not dependent on the scheme for which the authority originally acquired the land?***
 - (b) ***Should the present period of 10 years be changed? If so, to what period, and why?***
 - (c) ***Are any other changes needed (for example, to relate the provisions to the “valuation date” as established by case-law since the 1961 Act)?***
- (3) ***To what extent are these provisions used in practice? (We would welcome examples of individual cases, and any statistical information about the number of cases in which section 23 has been invoked, and with what financial consequences.)***

PROPOSAL 17: COMPENSATION FOR EFFECTS OF PUBLIC WORKS

- (1) ***Do consultees agree that the new law:***
 - (a) ***Should be based substantially on the existing law in 1965 Act section 10 (in modernised form, following the Wildtree Hotels case) and Part I of the 1973 Act; and***
 - (b) ***That it should take the form of an amended version of Part I of the 1973 Act (rather than being included in the Code for compensation for compulsory purchase)?***

- (2) *Alternatively, what should be the basis of the provisions in the new Code? (For example, do consultees favour a scheme along the lines of the ALRC proposals in App 4(ii))¹?***
- (3) *Should compensation be limited to diminution in market value of the affected land? If not what other matters should be included (for example, loss of profits)?***
- (4) *Should compensation for the effect of “physical factors” due to construction of the works be restricted to circumstances for which a claim would have arisen at common law?***

PROPOSAL 18: REPEALS

Do consultees have any comment on the proposed repeals?

IMPACT OF PROPOSALS

Do consultees have any comments on the likely impact of our proposals if they were to be enacted? We would welcome consultees’ feedback on both practical effect and cost-benefit impact (with tangible examples where available).

¹ Of the main Consultative Report, LCCP 165.

APPENDIX

THE NO-SCHEME RULE – ILLUSTRATIVE CASES

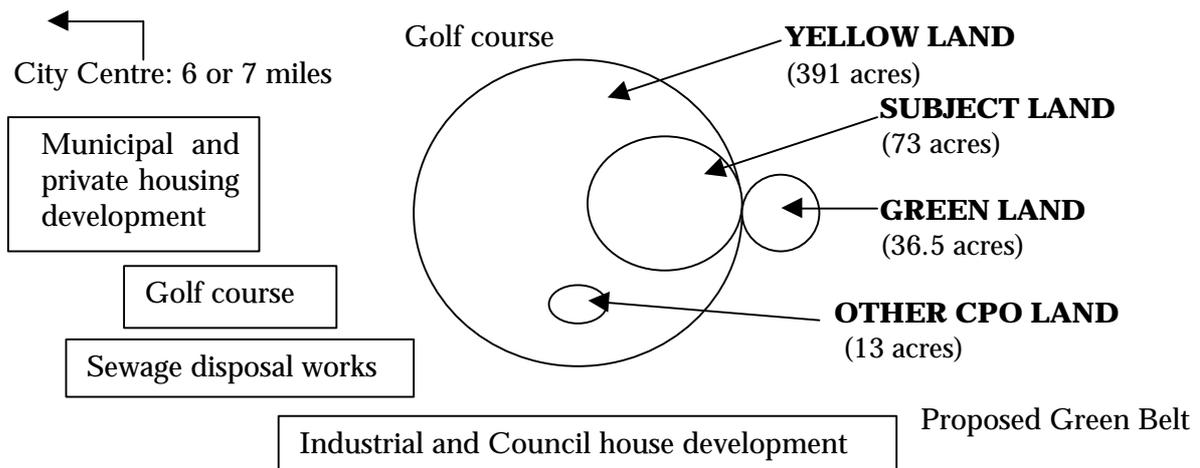
INTRODUCTION

- A.1 In this appendix, we have selected two cases, for the purposes of illustrating the effect of the present law: (A) applying compulsory purchase principles under the 1961 Act; (B) applying a “willing parties” approach, not subject to the 1961 Act. The facts and reasoning in each case illustrate the practical application of the different approaches in arriving at a figure of compensation.

(A) Compulsory purchase principles under the 1961 Act

Wilson v Liverpool City Council (1971)

- A.2 We have referred in the historical review to the judgment of the Court of Appeal, as settling the modern form of the judicial rule.¹ However, the decision of the Lands Tribunal² (which was upheld by the Court of Appeal) gives a fuller statement of the facts, and the steps by which the Tribunal arrived at the figure of compensation. It also illustrates the operation of the 1961 Act provision for deduction of “betterment” on adjoining land,³ which were not in issue in the Court of Appeal.
- A.3 The case concerned a compulsory purchase order made in 1964 relating to 73 acres of land owned by Mr Wilson (the “subject” land). It formed part of an area of 391 acres of agricultural land (the “yellow” land), some 6 miles to the east of the centre of Liverpool, for which at that time the Council were seeking to develop for residential and ancillary purposes. Mr Wilson also owned a further area of 36.5 acres (the “green” land), which was contiguous to the subject land, but outside the yellow land.



¹ [1971] 1 WLR 302. See Consultative Report, LCCP 165, App 5, para A.73.

² [1969] RVR 741, LT.

³ 1961 Act, s 7 (see Consultative Report, LCCP 165, App 3 for the text).

A.4 The background was as follows:-

- (1) At the material time, the development plan showed the area as so-called “white land”, not zoned for development in the development plan. The area was surrounded on three sides by various forms of built development and golf courses, and on the other by “provisional” green belt.
- (2) From about 1961, it became become apparent that such provisional green belt areas were unlikely to be released for development, thus increasing the pressure for release of white land. From that time the owners of land in the area of the yellow land, began to make applications for permission for development of their own land. In July 1962, Mr Wilson made an application for housing development of the subject and green land together, which was refused by the Council, but then appealed to the Minister.
- (3) In February 1963 the Council adopted a 10 year programme to provide 5,000 houses per year to meet the housing the needs of its area.
- (4) In March 1963, the development committee resolved to apply for permission for housing development of the yellow land (including the subject land, that is the 73 acres belonging to Mr Wilson), and gave authority to negotiate for the acquisition of this land. In May 1963, the Council applied to the Minister for outline planning permission for development of the yellow land for residential and ancillary purposes. In September 1963, it approved in principle proposals for development, including 210 acres of housing, 120 acres of open space, education, shopping and other facilities, and provision of roads and sewerage. In November 1963, the Minister granted permission for development of the whole of the yellow land, reserving for his own approval the layout and details.
- (5) In January 1964, the Minister allowed Mr Wilson’s appeal and granted outline permission for housing development of the subject land and the green land.
- (6) In February 1964, the Council made a compulsory purchase order in respect of the 86 acres of the yellow land, including the subject land (but not the green land), and a further 13 acres belonging to smaller owners. The other 305 acres of the yellow land had been acquired by agreement. Following a public inquiry, the order was confirmed in January 1965.
- (7) In May 1965 notice to treat was served for the subject land, and the other 13 acres, within the order. In June 1965, the Minister approved a master plan for the development of the yellow land, subject to further details.
- (8) In June 1965, Mr Wilson exchanged contracts for sale of the green land at a price equivalent to £6,700 per acre.
- (9) In June 1966, the council took possession of the subject land, following notice of entry.
- (10) In January 1968 the Minister gave final clearance to the Council’s proposals for the yellow land.

A.5 The Lands Tribunal held that £343,465 compensation was payable, representing £392,808 for the subject land (£5,350 per acre), less £49,343 for “betterment” of the green land (£1,350 per acre). The main points were:

- (1) There was in existence at the date of the notice to treat⁴ a scheme underlying the acquisition of the claimants’ land within the *Pointe Gourde* principle. The scheme was the Council’s proposal to develop the whole area of 391 acres. It was sufficiently precise to enable the owners of the land to find out what was in it on the Minister’s grant of planning permission (1963) or at the latest at the confirmation of the compulsory purchase order in 1965.⁵
- (2) The subject land had to be valued with the benefit of the existing permission for housing development (1961 Act, s 14(2)), and an assumed permission for development in accordance with the Council’s proposal (s 15(1)), regardless of whether they would have been granted in the absence of the scheme.
- (3) The sale of the green land at £6,700 was evidence of the “dead ripe” value of land for residential development, but that figure was in part attributable to the purchaser’s knowledge of the scheme, and the fact that roads and sewers would be available. Without that knowledge, the price for land (even assuming an existing permission) would have reflected a likely deferment for 2 years, and a deduction for the cost of sewers and wayleaves; giving a figure of £5,350 per acre.
- (4) Applying the same approach, the “betterment” on the adjoining land (to be deducted under 1961 Act, s 7⁶) was assessed at £6,700 - £5,350 = £1,350 per acre.⁷

⁴ The notice to treat was taken as the date of valuation, following the normal practice, before *Birmingham City Corpn v West Midland Baptist (Trust) Association Inc* [1970] AC 874 established the date of possession as the correct date (see Consultative Report, LCCP 165, Part V, para 5.68 above); although that case had been decided by the time of the appeal, the Court of Appeal refused to allow this issue to be reopened: see [1971] 1 WLR at pp 306-7.

⁵ The Tribunal rejected the claimant’s argument that there could be no “scheme” until all necessary consents had been obtained, and all decisions in principle made, which they put at January 1968, when the Minister gave final clearance: *ibid*, p 748.

⁶ Note that under s 7, the question was whether the value of the green land was increased, not by the “scheme”, but by the prospect of development of the 86 acres included in the compulsory purchase order. The Tribunal held, however, that the Council’s developing the 86 acres was as good a guarantee of sewerage and other facilities for the 36.5 acres as was its wider scheme.

⁷ The Policy Statement proposes that in the new Code, such “betterment” would only be deducted from compensation for severance or injurious affection: see Consultative Report, LCCP 165, Part V, para 5.33. On that basis, there would have been no deduction in the *Wilson* case.

(B) “Willing parties” outside the 1961 Act

***Mercury Communications Ltd v London and India Dock Investments Ltd (1995)*⁸**

A.6 Mercury needed to lay and use cable ducts under a private road owned by the defendants (“LIDI”). The ducts were needed to provide additional telecommunications links between Mercury’s “Earth Station” in East London, and the development at Canary Wharf. Under the Telecommunications Act 1984, the County Court had power to make a compulsory order granting the necessary rights, subject to terms as to compensation, that is:

Such terms as to the payment of consideration... as it appears to the court would have been fair and reasonable if the agreement had been given willingly... (Sched 2, para 7(a))

A.7 Mercury argued that compulsory purchase principles were applicable; and that accordingly the consideration should be nil, or nominal, since any increase in value due to the Mercury scheme must be ignored. LDDI argued that compulsory purchase principles did not apply, and that they should be treated as entitled to negotiate for an annual payment, based on a share of Mercury’s anticipated profits from the Canary Wharf operation (by analogy with the approach in *Stokes v Cambridge Corp*⁹). They put this at £24,175 p. a.

A.8 The Court held that:

- (1) The words “fair and reasonable” necessarily involved “an element of subjective judicial opinion”, depending on the judge’s own perception, rather than a purely objective assessment of “market value”.¹⁰
- (2) Both grantor and grantee must be assumed to be “willing”.¹¹ Relevant guidance was to be obtained from cases dealing with the meaning of “willing” seller and purchaser, in the compensation context. But, otherwise, compulsory purchase rules, including the *Pointe Gourde* principle, had no application under the Code.¹²
- (3) The share of profits basis, proposed by LDDI, was not appropriate, except where what is in issue is a single capital payment, and the “benefit to the developer/payer can be relatively easily quantified, as in the typical *Stokes v Cambridge* situation.”¹³

⁸ (1995) 69 P&CR 135 (HH Judge Hague QC, Mayor’s and City of London County Court).

⁹ (1962) 13 P&CR 77, LT (See Consultative Report, LCCP 165, App 5). The Lands Tribunal held that the compensation payable for a development site, should be reduced by one third, representing the price which would have had to be paid to the owner of a strip of adjoining land, which held the key to access.

¹⁰ 69 P&CR 135, 144.

¹¹ *Ibid.*

¹² *Ibid.*, pp 145-50, 156.

¹³ *Ibid.*, p 161.

- (4) The appropriate payment should be a capital payment or annual rent, reflecting “the anticipated use of the right and thus its importance and the value to the grantee.”¹⁴ This could only be determined by reference to evidence of comparable transactions.
- (5) The best starting-point was the agreements entered into by the parties in 1987-8, authorising the installation of the original ducts, which had provided for annual payments, equivalent to £4,000 at current values. Although this figure had involved a “horse-deal”, and had been affected by Mercury’s “anxiety to settle” because of the constraints at the time, it appeared to the judge to be “in the right sort of bracket” and “of a kind that appears fair to both parties and reasonable”. The figure had to be adjusted it, (inter alia) downwards to discount the element of “anxiety”, and upwards to take account of the numbers of cables.¹⁵
- (6) Having made these adjustments, the judge arrived at an annual figure of £9,000, which he determined to be “fair to both parties and reasonable on the basis that the deed of grant was given willingly”.¹⁶

¹⁴ *Ibid*, pp 162-3. He drew an analogy with cases where the court has to fix “consideration for a right of importance and value to the grantee, but which causes no detriment to the grantor...”: e.g. *Whitwam v Westminster Brymbo Co* [1896] 2 Ch 538, where the defendant had run trucks over rails on land belonging to the plaintiff, and damages were based on appropriate wayleave rent, whether or not the defendants made any profit (pp 542-3).

¹⁵ *Ibid*, p 168.

¹⁶ *Ibid*, p 169.