

EXECUTIVE SUMMARY

COMPULSORY PURCHASE AND THE COMPENSATION CODE

The current law of compulsory purchase is a patchwork of diverse rules, derived from a variety of statutes and cases over more than 100 years, which are neither accessible to those affected, nor readily capable of interpretation save by specialists. The case for reform has been recognised for many years. In July 2000, the Compulsory Purchase Policy Review Advisory Group (“CPPRAG”), which had been established by the DETR, reported that the law was “an unwieldy and lumbering creature” and made a number of recommendations for detailed improvements to the law. In particular, it proposed that the Law Commission should be asked to prepare new legislation which would both set out standard procedures and contain a clearly defined Compensation Code. The Lord Chancellor subsequently approved terms of reference, requiring the Commission to review the law relating to compulsory purchase of land and compensation, and to make proposals for simplifying, consolidating and codifying the law.

Two Consultative Reports were published in 2002. The first (CP 165) dealt with Compensation; the second (CP 169) with Procedure. This Report carries forward the issues covered by the first Consultative Report, makes final recommendations for the reform of the law relating to compensation for compulsory purchase, and sets out the basis for a Compensation Code. We intend to publish a further Report in 2004 on compulsory purchase procedure, dealing with the issues contained in the second Consultative Report.

Although the Report does not contain a Bill, it presents a Compensation Code as an indicative framework for possible future legislation. The “Code” is designed to maintain, and build on, the main features of the existing law within a simpler and more logical structure, using more accessible labels. Its essential objective is clarification of principle. Clarity, consistency, and accessibility should reduce the time expended on legislative interpretation, facilitate and expedite negotiated settlements, and enable the Lands Tribunal to concentrate on disputes of fact and valuation, not law. In view of the policy changes already proposed by CPPRAG and DETR, we have regarded our primary task as related to form, rather than substance. However, the Code is not simply a restatement. We have proposed amendments where necessary to remove unfairness or anomalies.

THE RIGHT TO COMPENSATION AND HOW IT IS TO BE ASSESSED

The Code commences with a clear statement of entitlement confirming that any person (“the claimant”), from whom an interest is acquired (or whose interest or right in land is extinguished or overridden) by compulsory purchase, is entitled to compensation. The assessment of compensation is made in accordance with the underlying principle of “fair compensation”, having regard to four heads (based on traditional principles): market value of the acquired land; injury to retained land; consequential loss; and (where the tests are fulfilled) equivalent reinstatement.

MARKET VALUE

Market value, under the first head, is the amount which the land might be expected to realise if sold in the open market by a willing seller to a willing buyer.

(The amount cannot be less than nil.) This rule follows the existing law, and existing case-law will continue to be relevant.

INJURY TO RETAINED LAND

The claimant is also entitled to compensation for the reduction in value of other land previously held with the acquired land (“retained land”). This encompasses two largely distinct categories of compensation, long recognised under existing law: first, for the effect of the severance of the acquired land from the retained land (“severance”); and secondly, for the effect of the works on the retained land, both during construction and subsequently (“injurious affection”). Compensation is measured by the decrease in the market value of the retained land. Any increase in value of any retained land must be off-set, as “betterment”, against the decrease due to severance or injurious affection. (We have taken account of a recommendation of CPPRAG, accepted by Government, that such betterment should be off-set only against severance or injurious affection, and not against other heads.)

CONSEQUENTIAL LOSS

The claimant may have suffered consequential loss which is not reflected in the sums attributable to the loss of the land acquired or to the reduction in value of any land retained. Typical examples are removal expenses, temporary loss of profits of a business, and legal or other professional costs reasonably incurred by the claimant in connection with the acquisition.

We have used the term “consequential loss”, rather than the traditional term “disturbance”, to make clear that compensation is not necessarily confined to loss suffered by disturbance of occupation. This reflects case law under section 5(6) of the Land Compensation Act 1961. In general, the Code permits recovery of all losses, not reflected in the value of land, which are the natural and reasonable consequence of the compulsory purchase and not too remote.

There are special rules concerning displacement of businesses. The normal rule is that compensation is paid on “the relocation basis” (including loss of profits and incidental costs of relocation), provided relocation is reasonably practicable and genuinely intended, and the cost is not unreasonable. Where a higher price is paid for the relocation premises, there is a presumption of “value for money” (as under the existing law. Where relocation is impracticable, the claim may be on “the extinguishment basis”, reflecting the value of the business as a going concern. To remove a possible doubt under existing law, it is made clear that, in determining whether compensation should be assessed on a relocation or extinguishment basis, the claimant’s personal circumstances, including financial circumstances, are to be taken into account.

EQUIVALENT REINSTATEMENT

Compensation may be exceptionally assessed on the “equivalent reinstatement” basis, where the acquired land has been adapted and used for purposes for which there is no general market, and where reinstatement in some other place is genuinely intended. (For instance, the land may be used as a church or other place of worship.) In such cases, the claimant may seek to be compensated for the reasonable cost of the reinstatement. The Tribunal has a residual discretion to refuse compensation on that basis, where the cost of reinstatement is

disproportionate having regard to the likely benefit to the claimant. This rule reflects existing law. However, we include a new provision, enabling the authority to impose conditions to ensure that the compensation is used for its intended purpose.

GENERAL RULES

We retain three incidental rules, recognised by existing law: first, the “illegality” principle, that any element of value or loss attributable to a use which is contrary to law is to be disregarded (subject to a new, but limited discretion for the Tribunal to disapply the rule having regard to the nature of the breach); secondly, the “consistency” principle, that where the land is valued on the basis of potential for development or change of use, compensation is not allowed for loss or damage that would necessarily have arisen in realising that potential; and, thirdly, the “mitigation” principle, that compensation is liable to be reduced where the authority shows that the claimant failed to mitigate his loss.

DATE OF VALUATION

The cases establish that land is to be valued at the date of when compensation is agreed or determined, or if earlier the date when possession is taken by the authority. The Code takes that as the basic rule for deciding all issues relevant for compensation, including physical and planning circumstances, save as otherwise provided. Again reflecting existing case-law, compensation for consequential loss is assessed by reference to the circumstances known or anticipated at the date of assessment; and compensation on the equivalent reinstatement basis is assessed by reference to the date on which reinstatement becomes reasonably practicable.

DISREGARD OF THE STATUTORY PROJECT AND PLANNING STATUS

Relatively straight-forward to state, but often very difficult to apply, the principle of project disregard (otherwise known as the “no-scheme” or “*Pointe Gourde*” rule) is one of the most complex issues in compulsory purchase law. The problem arises mainly from the lack of consistency in the many formulations of the rule, in statute and case-law. Essentially, assessment of compensation payable for the acquired land should not take account of any increases or decreases in value attributable to the statutory project or scheme for which the land is acquired. Under the existing law, this has required consideration of the state of affairs which would have existed had there never been a scheme of acquisition. The proper identification of “the scheme” may then become the source of dispute between the claimant and the acquiring authority; as may “the rewriting of history” in the “no-scheme world”, sometimes over many years.

The Report notes the unanimity among respondents for the need to “clear the decks”, by replacing all existing formulations, by a single set of statutory rules. In an attempt to clarify its operation, the Report seeks to redefine the purposes of the rule, which differ in relation to the effects respectively on claimants and acquiring authorities. The proposed Code contains a new set of rules, based on “the statutory project”, the definition of which follows our “preferred version” of previous formulations. The room for speculation is limited by use of the “cancellation assumption” (approved by the House of Lords in relation to planning assumptions); that is, the position is considered as though the project were cancelled at the valuation date, rather than as though there never had been such project or any indication of it.

The rules for planning assumptions are treated separately. They follow the general approach of the existing law. Account is taken of any planning permissions in force at the valuation date, as well as the future prospect of any other such planning permissions. Account is also taken of the value of any appropriate alternative development (that is development of a type which, applying the cancellation assumption, might reasonably have been expected to be permitted on an application considered on the valuation date). The main difference from the existing law is that there is no automatic assumption of permission for the authority's own proposals, unless it has been granted, or would have been granted, to a private developer.

We follow the existing law, by providing for an application for an alternative development certificate from the local planning authority, and the likely conditions obligations or requirements of such permission. An important change is that the right of appeal against a certificate would be to the Lands Tribunal, rather than to the Secretary of State (or National Assembly for Wales). This is designed to ensure that the Tribunal is the ultimate arbiter of all issues relevant to compensation, and also to avoid the possibility of the appeal agency being judge in its own cause (as may happen, for example, in relation to a road scheme promoted by the NAW).

ACQUISITION OF NEW RIGHTS AND INTERFERENCE WITH EXISTING RIGHTS

Where the acquiring authority obtains a new right over land of the claimant, compensation will be assessed having regard to any depreciation in the market value of the claimant's land (not only the land over which the right is acquired, but also any other land whose value is reduced) and any consequential loss.

The Code also recognises the right to compensation of those persons whose rights over the acquired land (such as easements or restrictive covenants) are overridden by carrying out the project. Compensation will be assessed by reference to the reduction in the market value of the land to which the right is attached, and any consequential loss. (The provision for consequential loss in this case is an innovation, to ensure consistency with the other rules.)

DEPRECIATION CAUSED BY PUBLIC WORKS

Under a provision going back to 1845, adjoining owners, whose land is not acquired but is adversely affected by the *construction* of the statutory works, have a right to compensation for "injurious affection", but only if they would have had a claim at common law. In 1973, a new statutory right was created for compensation for depreciation to adjoining land caused by the *use* of statutory works, not subject to the same restriction.

We propose that the two rights should be merged in the 1973 Act, to create a right to compensation for what we call "depreciation caused by public works". We propose to deal with this subject separately from the Code, because it is not strictly part of compulsory purchase law. Entitlement to compensation for injurious affection does not require any land to have been compulsorily acquired, and the losses being compensated are due, not to compulsory purchase as such, but to the statutory works.

Compensation for *construction* will follow the existing law, save that the claim is not limited to decrease in the value of land, but may include consequential loss such as temporary loss of profits. (This is an innovation intended to achieve greater

consistency with the rules applying where land is acquired.) Compensation for the adverse effects of *use* of the works, will continue to be based on the 1973 Act, subject to some detailed amendments proposed by CPPRAG.

ANCILLARY MATTERS

We recommend that additional jurisdiction be vested in the Lands Tribunal to determine any claim relating to damage to land or the use of land where it arises out of substantially the same facts as a compensation claim referred to it. This is principally to avoid arguments about the correct forum for dealing with cases arising out of negligence in carrying out the statutory works.

The rules for interest on compensation are based on the existing law, but allow more flexibility to take account of the fact that different heads of loss may be suffered at different times. The general rule, as now, is that interest is payable on compensation from the date when the authority takes possession, at a rate prescribed by statute. We recommend, however, as a change to the existing law, that the Lands Tribunal should have discretion to award interest at a higher or lower rate to reflect unreasonable conduct on the part of either party.

Claimants will continue to be entitled to advance payments on account of compensation, in accordance with sections 52 and 52A of the Land Compensation Act 1973. However, we propose a new statutory procedure in the County Court, on judicial review principles, by which the obligations of the authority in this regard may be better enforced.