

Is it Time for Reform?



EMINENT DOMAIN IN THE UNITED KINGDOM

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An urgent need for compulsory purchase reform has surfaced in England. A recent report by the Law Commission in England identified a number of areas where change was critical. Some of these have human rights implications, and several recent cases involving compulsory purchase compensation valuation have resulted in turmoil.

Among other issues, the current compulsory purchase process in the UK is considered extremely lengthy. In one notable case involving Heathrow Airport, the entire process took almost 20 years. Other common practices need to be reformed as well, such as improving negotiation practices by encouraging mediation instead of more tedious and lengthy court proceedings. Also, much of the terminology used in the compulsory purchase and compensation process dates back to the first consolidating Act of Parliament's Land Clauses Consolidation Act in 1845. Surprisingly, some of the present day legislation still contains wording that has not been altered since then.

Levels of Power

In the United Kingdom, compulsory purchase is the term used for taking land through statutory powers, widely recognized as eminent domain in North America.

While the intention is always to try and reach a settlement through negotiation, it is fair to say that having the right to use compulsory purchase powers are necessary even if they are not needed. However, much like in the U.S. and Canada, acquiring authorities are encouraged to acquire land by negotiation first and use compulsory purchase only as a last resort.

Since the UK is a relatively small but intensively developed country, the re-use of land within a developed area has become essential in protecting the surrounding environment. In recent times, compulsory purchase powers have been used effectively to renew and increase the existing housing stock and to regenerate areas of land and dilapidated buildings where a

previous use is no longer required. It is recognized that if used properly, this land re-use can contribute significantly toward effective and efficient urban and rural regeneration.

Central government departments, local authorities and other public bodies, generally known as acquiring authorities, that possess compulsory purchase powers, are only encouraged to use them if they can show real gains are brought to citizens and to the business community without delay. If the acquiring authorities do not take the initiative with compulsory purchase, a lot of regeneration work would be unlikely to happen.

It has been found that backing the negotiation process with a Compulsory Purchase Order (CPO) can work to expedite the negotiations process in many cases. For example, in one recent case, there were 133 interests that were identified for acquisition. Agreement to compensation was reached with 132 of those affected. Implementing the formal CPO process was only necessary in the case of a single landowner.

Urban and Rural Regeneration

Recently, compulsory purchase has been directed toward the provision of energy, particularly renewable energy. The UK's supply of north sea oil and gas is dwindling, and combined with the need to achieve climate change carbon reduction, it means that low carbon and renewable energy from nuclear, wind and wave are being developed with consequential investment in the electricity transmission network and underground gas storage. While compulsory purchase powers are seen as an important tool for assembling land needed, the acquiring authority must first demonstrate that there is a compelling case in the public interest that justifies the use of compulsory purchase.

Furthermore, the burden of establishing this compelling case lies with the acquiring authority. There is no primary assumption that compulsory purchase is in the public interest. It is not up to the person likely to be affected to demonstrate that compulsory powers should not be granted; the acquiring authority has to make its case and prove its need for compulsory purchase powers.

Two sources of compulsory purchase powers represent a combination of general and specific Acts of Parliament. At the government level, compulsory purchase powers are usually provided by a specific Act of Parliament. A recent example is the Channel Tunnel Rail Link Act 1996, which allowed for a high-speed rail linking the English Channel Tunnel to the center of London. At the county and local authority level, the CPO is used. Historically, these were used to facilitate transport, including canals, railways and roads. They were also used on behalf of local authority facilities, such as school, hospitals, defense establishments and airports.

Compulsory Purchase Activity

The period from 1996 through 2007 saw increasing use of the compulsory purchase process to facilitate major public infrastructure projects, such as the Channel Tunnel Rail Link, linking London directly to cities like Paris and beyond. Compulsory purchase was also used to create new stadiums for private football clubs, albeit with regeneration for poor quality areas as the background justification for such schemes.

However, although the financial and economic downturn beginning in 2008 led to many compulsory purchase schemes falling by the wayside, one significant project continues, and that is the site assembly for the 2012 Olympic Games. The CPO enabled all the lands needed for construction, and development of the new facilities to be secured was implemented in July 2007. Covering in excess of 500 acres (200 hectares) in East London, many parts had been previously identified for regeneration.

This was an area which attracted many of the less desirable but necessary businesses, such as waste transfer stations and reclamation businesses, and considerable remediation was necessary. It was also a particularly unattractive area of London. To improve its visual appearance, particularly for the Olympic Games, some 52 electricity towers were removed with the electricity supply cables being re-installed in tunnels underneath the land. Securing the site necessitated the displacement of roughly 800 businesses, the majority of which were relocated, although some had to close permanently.



The use of compulsory purchase in the UK ramped up between 1996 and 2007 to pave the way for many notable projects such as the Channel Tunnel, which connects England to mainland Europe.

The Infrastructure Planning Commission

A recent promising development in the compulsory purchase process was the creation of the Infrastructure Planning Commission in 2008, which went into effect in 2010. The commission's intended purpose was to create a fast-track process whereby a single body is responsible for securing planning permission and the use of compulsory purchase powers within a fixed period of some 12 to 18 months.

Just to put the timeframe into context, a period as long as 18 months is far more reasonable than the time it took to get to the opening of the new Terminal 5 at London's Heathrow Airport. In this case, the entire process took some 19 years from the time that the new terminal was proposed until the date of its official opening. This includes a four-year period from 1995 until 1999 during which the public inquiry took place!

The commission is tasked with looking at national projects, such as nuclear power, wind farms, railways and roads and reaching its decision in the light of national policy statements whereby it will issue a Development Consent Order. However, as with many political animals, the commission has been affected by the recent change in the ruling political party within the UK. Despite previous indications that it would be abolished, the commission will be retained, but its power will be curtailed and its recommendations will still be subject to Ministerial approval, much the same as a CPO.

The 5-Step Process

The process of getting a CPO breaks down into five stages. The first is drafting it in a format established by law. At this stage, the process only serves to invite those wishing to object to the CPO to lodge formal objections in a specified timeframe. If objections are received, then a public inquiry is held. This is the second stage and consists of a public examination of the justification by those



Recently, compulsory purchase in the UK has been directed toward the provision of renewable energy. The Scroby Sand Wind Farm is located 1.6 miles off the coast of Great Yarmouth in eastern England.

seeking compulsory purchase powers as to why those powers should be granted. The inquiry is overseen by an independent inspector appointed by the government, whose function is to hear arguments for and against the purpose for which the CPO is being sought. The inspector summarizes the evidence, prepares a report and provides a recommendation that is submitted to the appropriate central government Minister of State. This Minister must take a balanced view between the intention of those seeking the compulsory purchase powers and the affected landowners.

The third stage is the Minister's decision. The Minister must be satisfied that the acquiring authority has made out a compelling case that justifies the taking of another's land and must also be satisfied that, what the acquiring authority intends to do with the land once it has acquired it, will be done within a reasonable time scale. The Minister will do one of three things, confirm the CPO as made, confirm it with modifications (which will usually be the exclusion of an area of land where the Inspector and/or Minister believe there is no justification for its inclusion) or, in very rare cases, the Minister will refuse to confirm the CPO in its entirety. But the Minister must act reasonably. Even the Minister's decision can be challenged in the UK Courts if an objector has grounds for thinking that the decision was incorrect given the evidence.

The fourth stage is the confirmation of the CPO by a public announcement and notification to those affected by it. Once this is done, the Order has the power equivalent of an Act of Parliament. It will enable a person's land to be taken even when that person resists. In the majority of cases, the land will be taken before the compensation amount has been agreed upon.

The final stage is the implementation. A confirmed CPO has a total life expectancy of six years. Once confirmed, it must be activated within three years by serving a formal notice in respect to any land identified. Following this notification, there is another three years in which possession of the land must be taken. If the CPO does not get implemented within the first three years, or possession of the land is not taken within the subsequent three years, the CPO will lapse and be of no further use.

The Basis of Valuation

Very little of the law that applies to the valuation process is set down in statute. On the other hand, if all the case law that has arisen as a result of the various decisions of the UK law courts was printed and stacked up, you could realistically expect to see it reaching a considerable way up the height of the Statue of Liberty. Compensation law is very much based on case law rather than statute.

Two specific valuation rules are codified in the current compensation law. The Land Compensation Act 1961 sets out six statutory rules which govern the principles to be applied to determine compensation.

Rule 2 states, 'the value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize.' The assumption is that both parties are willing and neither

party is under duress to buy or sell. However, the market value must ignore any increase in value that arises solely as a result of compulsory purchase powers being used. For example, a compulsory purchase may comprise ten individual sites which have been acquired for \$10 each for a total acquisition cost of \$100. Once assembled, the site may have a new value of \$200 if it were to be resold, but the original owners of those ten individual sites would not get any additional payment to reflect any additional value created.

Rule 2 relies on value from market transactions, but sometimes properties are acquired using compulsory purchase powers where market evidence of value is not available. For particular types of property, such as schools, leisure facilities and churches, this can be challenging. In such cases, Rule 5 provides an alternative basis of valuation.

Rule 5 states 'where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, compensation may, if the Lands Tribunal is satisfied that reinstatement in some other cases is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement.' Under this basis of valuation, the acquiring authority exercising compulsory purchase powers must secure an alternative piece of land and build a replacement property. The owner of the land that is being compulsorily purchased takes ownership of the new facility and gives up ownership of its original facility in return.

Rule 6, the last rule relating to compulsory purchase valuation, states, 'the provision of Rule 2 shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land.' In essence, this rule provides compensation where occupiers of land are forced to relocate their businesses or homes. In the case of businesses, it will also provide compensation equivalent to the value of the business, if the business cannot find somewhere to relocate and consequently, is forced to close. But it is not a dollar for dollar reimbursement of the costs involved in moving. There is no guarantee of a 100% recovery of cost or loss.

In one example that is often encountered, an existing business may own some machinery that works well and produces a good quality product, but which cannot be moved due to its age. In such a case, the owner will only be compensated for the current value of the machinery, which will likely be considerably less than the cost of a new machine. But in order to continue its business, the owner will need to buy a new machine. Even so, the owner will not receive compensation for the difference between the current value and the cost of the new machine. The difference then becomes an out-of-pocket cost for the owner.

Dispute Resolution

Traditionally, when two sides are unable to agree on compensation, the matter is referred to the Lands Tribunal. A tribunal hearing will be presided over by either a barrister or a senior chartered

surveyor, or sometimes one of each, both of whom will be very experienced in compensation law and valuation.

The tribunal will decide the compensation to be paid based on the facts and arguments presented. There is no appeal to a higher court with respect to their decision regarding the amount of compensation to be paid. However, should the tribunal determine a point of law which either party disagrees with, an appeal can be made to the Court of Appeal and the Supreme Court.

More recently, alternative means of dispute resolution have evolved, largely because, as with all litigation, resorting to the courts is a very expensive and long-winded process. Mediation is now encouraged and widely used in an endeavor to bring two parties to an agreement with minimal costs. A variation of mediation is known as Early Neutral Evaluation (ENE), a process where both sides submit representations to a panel. The panel is usually comprised of a barrister and a surveyor, who are both experienced in compulsory purchase compensation law and practice. The ENE panel will then express their view as to how the matter might be determined should it be referred to the Lands Tribunal, but at considerably less cost.

Of course, in the case of either mediation or ENE, it is still open to both parties to take their case to the Lands Tribunal. Typically, one party will have given the other's case closer scrutiny and may prefer to reach a settlement rather than involve the Lands Tribunal, particularly when the risk of an adverse award of costs is factored in.

The Need for Reform

A number of areas indicate that urgent change is needed. But as with all things, it is a question of balance. In this case, the balance is unfortunately the need to find parliamentary time to amend the UK legislation relating to compulsory purchase compensation versus a perceived benefit. And as far as the politicians are concerned, this would interest relatively few voters. Hence, it becomes a low priority. But change is inevitable. The UK law was formulated over 150 years ago and will continue to evolve given the time.



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