COMPULSORY PURCHASE REFORM

A person's right to timely resolution

BY RICHARD GUYATT AND COLIN SMITH

Historically, the United Kingdom's compulsory purchase system has served the country well. The land and rights for new towns and urban regeneration such as highways, railways, airports, electricity and gas, water and sewage have all relied on compulsory purchase orders (CPOs). But modern society is less accepting and quicker to challenge CPOs than was the case when the principles were first established. Perhaps the time has come to rethink how land expropriation is administered, determined and practiced.

Tracing its Roots

The UK's compulsory purchase law has its roots in statutes dating back to canal building in the 18th century, and more significantly in railway legislation from the mid-19th century. Little has changed from when the country was rapidly industrializing, but still largely agrarian. Victorian terminology and values are still with us nearly 200 years later.

However, there has been fairly constant tinkering with the legislation since then, especially during the highway-building boom in the 1960s and 1970s and again in recent years. The Planning and Compulsory Purchase Act of 2004, the Planning Act of 2008, the Localism Act of 2011, Growth and Infrastructure Act 2013 and the Housing & Planning Bill have all dabbled in updating the system, but the changes concentrate on specific and minor issues.

Stalled reform

More than a decade ago, the UK Law Commission, a governmental body that reviews the country's laws, issued two reports proposing fundamental reforms to compulsory purchase and the law and procedure for compensation. In 2003, it released *Towards a Compulsory Purchase Code – Compensation,* followed in 2004 by *Towards a Compulsory Purchase Code – Procedure.*

Widely applauded by practitioners, the reports were shelved by the government on the basis that the process of reform would just be too complex. Subsequently the Compulsory Purchase Association (CPA) kept up the pressure. As an organization that channels the expertise of eminent domain and compensation practitioners, many of the changes in recent legislation have been initiated at the CPA's suggestion.

It is clear that the relevant government departments are listening. The small changes do help, but the inherent inadequacies of the current system remain. A number of advantages would ensue from a fundamental change in how land assembly occurs.

The Traditional Approach

The processes used in compulsory purchase can be summed up in a few short sentences:

- No one should have their land taken away without the appropriate legal process;
- This process must have its origins in parliament, either by law or through a process where parliament delegates the decision-making process to a minister;
- Those to be dispossessed have the right to have their objections considered by the decision maker; and
- Affected parties are entitled to just compensation to put them, so far as money is able to do so, in the same position as if the dispossession had not occurred.

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The origins of these principles can be found as far back as Magna Carta and are common in virtually all jurisdictions beyond our shores. They are sound and should be absolute. It is essential that any process of expropriation is seen as fair, credible and providing an appropriate balance between the public needs and the private individual's interest.

The existing compulsory purchase system largely fulfills these principles. Forcible possession is rare, as is protester disruption to projects. This suggests that at least the process of authorizing compulsory purchase is one that our society sees as fair. However, small businesses in particular rarely see the process of assessing compensation as fair and reasonable. Many feel that they were not listened to, and that the acquiring authority did not respect their concerns. In most instances, owners and occupiers have their property taken before any payment of compensation is made, and while professional fees are often reimbursed promptly, claimants are left to fend for themselves in terms of securing relocation sites, funding and compensation.

The UK at the Frontline

There is much in the UK compulsory purchase process that is world respected. Our process for authorizing land assembly is highly esteemed in other jurisdictions, and there is certainly much to be proud of in terms of the rule of law. It is clear that the UK's principles of blight and injurious affection as a result of the physical effects of public works are bonus features to many practitioners versed in other jurisdictions, although both are often criticized in our own jurisdiction.

However, blight processes exist because we take far longer to deliver our projects than most other countries, resulting in a much greater length of time when blight is an issue. Also, due to the UK's high-population density, the physical effects of our projects must be compensated for, as many property owners must face the reality that public works will be located in proximity.

Learning from Others

When compared to the United States, particularly on projects where federal funding is involved, it is apparent that the UK does not provide the appropriate balance between those assembling land and those being dispossessed.

In the U.S., the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 requires that any project involving federal money must demonstrate a good faith effort in negotiating with a displaced individual or business. Reasonable endeavors must be used to secure the relocation of the displacee. For the acquirer, it is a hands-on process with practical assistance and support. A process of appraisal is

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carried out to assess value early on. Rather than create years of uncertainty about the process of authorizing a CPO, compensation is discussed before expropriation can even begin.

All too frequently, the UK Secretary of State authorizes a CPO following an inquiry where the acquiring authority, usually through its development partner, simply assures the Secretary of State that negotiations continue. Because the principle of any order confirming process is that compensation is not a matter for the inquiry, it is easy for acquiring authorities to go through the motions. Often times it is only lip service being paid—not a genuine commitment to provide timely compensation—removing the need for the claimant to finance the relocation process. Unfortunately, those who find themselves receiving a CPO often suffer years of uncertainty, risk and an inability to plan while occupying land that they cannot vacate simply because another body promoting a CPO wants to profit from taking that land at an undetermined time.

To this end, in 2015 the UK Department for Communities and Local Government issued CPO guidance suggesting that compulsory purchase should be viewed only as a “last resort” power and that an acquiring authority must, as part of its compelling case in the public interest, demonstrate that reasonable endeavors have been used to secure land by agreement. But frequently, this principle is largely disregarded by acquiring authorities and those backing them, and it is rarely an issue pursued by inspectors. Acquiring authorities and developers should be compelled to observe this vitally important point.

Need for a Cultural Shift

Compulsory purchase will always be controversial, difficult and stressful. However, with updated and clearly defined rules for early negotiation, both parties would benefit. The UK needs a system where confrontation is replaced—to the extent that it can be—by a process where both parties understand each other’s goals and timing issues from the outset and work together to achieve successful relocation, if there are sound public reasons for land assembly to occur. This largely cultural change would reduce time, cost and stress for both sides and lead to a win-win situation, where infrastructure is delivered more swiftly and with far less disruption for those who have to make way.

For those being displaced, upfront negotiations and clarity of offer has huge advantages. After all, the principal criticism from a company or person being relocated is usually the long period of uncertainty, which leads to resentment and distrust. If both parties know the imperative on an acquiring authority to achieve relocation—albeit not at any price—with a clear threshold after which expropriation will be swift if an owner will not come to the table, it is more likely that negotiations will succeed.

The advisors for acquiring authorities should use the compensation code not as a weapon, but rather as a guide. Achieving certainty and speed of resolution is to everyone’s advantage. ✪

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